88-189

No. 88-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

BELL ATLANTIC,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit should have vacated as moot a District Court injunction when, during the pendency of an appeal from the injunction, the controversy before the Court of Appeals was eliminated by an intervening final action of the Federal Communications Commission?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the District of Columbia, whose judgment is sought to be reviewed, were Bell Atlantic, Pacific Telesis Group, and U S West, appellants; American Telephone and Telegraph Company and the United States Department of Justice, appellees; and American Information Technologies Corporation, MCI Communications Corporation, New England Telephone and Telegraph Company, New York Telephone Company, Utilities Telecommunications Council, and Ad Hoc Telecommunications Users Committee, intervenors.

LISTINGS REQUIRED BY RULE 28.1

Bell Atlantic does not have a parent company. Its subsidiaries and affiliates (other than wholly-owned subsidiaries) are Bell Communications Research, Inc., Bell Atlantic Directory Graphics, Inc., and two partnerships: the Chesapeake Directory Sales Company and Bell Atlantic Vehicular Leasing. In addition, Bell Atlantic Mobile Systems, Inc., Bell Atlantic's cellular subsidiary, participates in several limited partnerships which provide cellular service in various metropolitan areas. Bell Atlantic Properties, Inc., Bell Atlantic's real estate subsidiary, is also involved in several real estate development partnerships. None of these partnerships has securities outstanding to the general public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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Petitioner prays for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 846 F.2d 1422 and is set forth in Appendix A, pp. 1a-36a, below. The opinion of the Federal Communications Commission is reported at 2 F.C.C. Rec. 7458 (1987), and is set forth in Appendix B, pp. 37a-51a, below. The relevant opinions and orders of the United States District Court for the District of Columbia are unpublished and are set forth in Appendix C, pp. 52a-54a, below, Appendix D, pp. 55a-61a, below, and Appendix E, pp. 62a, below.

JURISDICTION

The final judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 10, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section 2 of the Article III of the Constitution of the United States provides, in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and the Treaties made, or which shall be made, under their Authority . . . .

STATEMENT OF THE CASE

1. *Introduction*

Over a vigorous dissent by Circuit Judge Starr, a panel majority of the Court of Appeals consisting of Circuit Judges Edwards and Mikva issued an opinion on the merits in this case even though the controversy before it had become moot.

The Court of Appeals had under consideration whether the District Court was authorized to enter an injunction, incident to its administration of the American Telephone and Telegraph Company ("AT&T") antitrust consent decree, dictating pricing rules for certain telephone services. During the pendency of the appeal, the Federal Communications Commission ("FCC"), in a separate proceeding, ordered the same relief that had been provided by the District Court. Judge Starr, citing then Circuit Judge Scalia's admonition that the federal courts are not "self-directed boards of legal inquiry and research," properly concluded that the FCC's action mooted the controversy because any decision by the Court of Appeals would have no effect on the parties. (P. 25a, below.)

The panel majority decided, however, to render a decision on the merits anyway, issuing an opinion which would vest extraordinary authority over telephone rates in the District Court. The Court of Appeals took this action even though the AT&T decree was affirmed by this Court only after it had been assured by the parties to the decree that the consent decree would not disturb the normal ratemaking jurisdiction of state and federal regulators of telephone service.

In issuing this controversial opinion despite the absence of any live and on-going controversy, the Court of Appeals abruptly departed from previous Supreme Court and other federal court authority and put itself squarely in conflict with a Fifth Circuit ruling on a similar claim of mootness.

2. *Proceedings Below*

This matter arose because of a disagreement over the scope of the "non-discrimination" provisions in the Modification of Final Judgment ("MFJ")—the consent decree which caused AT&T to divest its local telephone companies and which imposed a series of continuing obligations and prohibitions on those local telephone companies.[1] The disagreement centered on whether the "non-discrimination" provisions of the decree applied to the particular controversy before the District Court and, if so, whether those provisions gave the District Court authority over telephone rates parallel to that exercised by state and federal regulators under statutory "non-discrimination" standards.

The rates in question were for telephone service used in connection with the Federal Telecommunications System ("FTS"). FTS is the private long distance telephone network dedicated to the federal government. It connects

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[1] *United States* v. *Western Electric Co.*, 552 F. Supp. 131, 226-34 (D.D.C. 1982), *aff'd mem. sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

government offices throughout the country, but it can also be used to make long distance calls from government offices to places that are not on the government's private telephone network. These calls are referred to as "off-net" calls.

The local lines used to complete off-net calls are generally provided by the divested local telephone companies, such as the operating subsidiaries of U S West and Petitioner Bell Atlantic. These local lines are the same lines which government, business and residential customers use for local telephone service and which long distance companies use for the origination and termination of long distance toll calls.

The rates charged for use of these local lines are determined by the FCC and state regulatory commissions, and vary depending upon how the lines are used and who uses them. AT&T and other long distance companies pay one level of rates to complete long distance calls for their customers. Subscribers to local telephone service pay different rates, specially designed for business and residential users. These rates are generally lower than the rates paid by long distance companies.

On November 6, 1986, Respondent AT&T filed an emergency motion in the District Court. AT&T and U S West were then preparing competing bids for switching services to be used by the federal government for portions of the FTS network located in several cities where operating subsidiaries of U S West supply local telephone service. AT&T complained that, if it were awarded contracts to supply switching services in these locations, it would have to pay a higher rate for use of local telephone lines needed to complete the system's off-net calls. On the other hand, AT&T charged, if the federal government were to award the contracts for switching services to its competitor U S West, the government would be charged a lower rate for use of local telephone lines.

On the basis of these allegations, AT&T asserted that U S West's anticipated pricing practices were in violation of the MFJ's "non-discrimination" provisions. In light of the approaching deadline for bids on the FTS switching service contracts, AT&T requested the District Court to enjoin U S West's pricing practices on an emergency basis.[2]

U S West and a number of other telephone companies, including the Bell Atlantic telephone companies, opposed AT&T's motion in the District Court. The telephone companies asserted that AT&T was eligible to pay the same lower rates for local lines that the federal government would be charged if U S West switching services were selected, so long as AT&T used those lines in the same way as they would be used in connection with the U S West switching equipment. The telephone companies also argued that, in any event, there was no violation of the MFJ because when the decree was entered in 1982, both the District Court and the parties to the decree expressly recognized that long distance companies such as AT&T could be charged one rate for their use of local lines, while government, business, and residential customers could be charged different, lower rates for use of the same lines. At that time, there was no suggestion that the MFJ would require those rate differences to be eliminated when, as in the case of FTS switching services, the local telephone companies and AT&T offered competing services.

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[2] AT&T also argued that U S West was going to discriminate against it by charging it for certain facilities (called "dial 8 trunks") in connection with AT&T's proposed switching services, although U S West would not, according to AT&T, include a fee for these facilities in its own proposal. U S West argued that, contrary to AT&T's claims, it included the cost of these facilities in its prices. The District Court did not resolve the parties' factual dispute over the dial 8 trunk issue, nor did it otherwise expressly deal with the issue.

The telephone companies also pointed out that the MFJ left decisions about ratemaking issues to the FCC and state public utility commissions. They reminded the District Court that, when the District Court order entering the MFJ had originally been appealed to the Supreme Court in 1982, state regulators had claimed that the decree could interfere with their ability to regulate telephone service. In response, both the Solicitor General and AT&T had represented to this Court that nothing in the decree would confer upon the District Court the ability to interfere with the normal supervision of telephone rates exercised by federal and state regulators.[3] After these representations, this Court summarily affirmed the District Court's order approving the MFJ.[4]

On November 26, 1986, twenty days after receiving AT&T's motion, the District Court concluded that the "non-discrimination" provisions of the consent decree required U S West to charge AT&T and the federal government the same rate for local lines used to complete off-net calls regardless of whose switching equipment was used. (Pp. 55a-61a, below.) The District Court's decision called into question virtually all of the divested telephone companies' tariffs because, under the supervision and direction of federal and state regulators, telephone companies have traditionally charged different rates to different classes of customers for their use of the same local lines. To resolve this uncertainty, Bell Atlantic moved for clarification, asking the District Court to make clear that its decision was directed solely to the particular dispute and the parties before it and that the decision did not constitute a rule of general application for local telephone rates.

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[3] *See* AT&T Motion to Affirm at 24 and United States Motion to Affirm at 23-24, *Maryland* v. *United States*, 460 U.S. 1001 (1983) (Nos. 82-952 *et al.*).

[4] 460 U.S. 1001 (1983).

Bell Atlantic concurrently filed a petition for a declaratory ruling with the FCC, the regulatory body whose pricing rules govern the rates for off-net calls from the FTS network. Bell Atlantic asked whether the FCC's rules, in the type of situation presented to the District Court, were consistent with the District Court's decision in the matter. Bell Atlantic also sought a stay from the District Court pending the FCC's consideration of Bell Atlantic's petition.

On March 31, 1987, the District Court denied Bell Atlantic's motion for clarification, holding that the "principles" set forth in its original order were "clear" and "not fact-specific." (Pp. 52a-54a, below.) The District Court also denied Bell Atlantic's request for a stay. (*Id.*) Bell Atlantic filed a timely appeal. The United States Court of Appeals for the District of Columbia Circuit consolidated all appeals from the District Court's orders of November 26, 1986, and March 31, 1987.

While the consolidated appeals were pending, the FCC issued a memorandum opinion and order in response to Bell Atlantic's petition for a declaratory ruling. (Pp. 37a-51a, below.) In its decision, the FCC declared that, in the type of situation that had been in controversy before the District Court, the telephone companies must charge the same rates for local lines used for off-net calls regardless of whether the lines are purchased by a long distance company or some other customer. The FCC's decision provided the same relief that AT&T had been granted by the District Court.[5]

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[5] In a related action on the same day, the FCC released a Notice of Proposed Rule Making pertaining to the rates which private owners of telephone equipment must pay for the use of local lines. *See In re Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange*, 2 F.C.C. Rec. 7441 (1987). The FCC made it clear in its Notice that it did not intend to use this rulemaking proceeding to reverse its decision in response to Bell Atlantic's petition. Instead, the rulemaking was intended to initiate an inquiry into a broad

Bell Atlantic immediately notified the Court of Appeals of the FCC's decision and explained that the agency's intervening action had rendered the case moot. *See* Reply Br. for Appellant Bell Atlantic at 4-6.

3. *Decision of the Court of Appeals*

In a split decision, a majority of the Court of Appeals panel ruled that the FCC's action had not mooted the District Court's orders; the panel affirmed the District Court's interpretation of the MFJ's "non-discrimination" provisions with the qualification that it did "not embrace statements made by the [district] court in denying clarification that might suggest that it was resolving matters not before it . . . ." (P. 5a, below.) The Court of Appeals also stated that the District Court's order should not be understood to assert a broad claim of authority over telephone rates in cases where rate "disparities were required by state or federal regulations." (P. 20a, below.)

Writing for the majority, Judge Edwards, joined by Judge Mikva, offered a number of reasons why the FCC's intervening decision should not be held to moot the District Court's actions. (Pp. 20a-24a, below.) First, Judge Edwards asserted that the case was not moot because AT&T had not been attempting to "vindicate its rights *under the MFJ*" before the FCC, and the FCC's action did not settle the parties' dispute over the proper interpretation of the MFJ's "non-discrimination" provisions nor did it "purport to provide any relief" to AT&T. (P. 20a, below (emphasis in original).) Judge Edwards also cited the facts that Bell Atlantic (rather than AT&T) had sought the FCC's declaratory ruling and that the request had been filed with the FCC "[o]nly after the District Court had handed down its decision" and only for the purpose of "clarification of the agency's access charge rules." (*Id.*) Finally, Judge Edwards sug-

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range of issues not dealt with in the FCC's disposition of the Bell Atlantic petition.

gested that the FCC's decision should not be construed to moot the District Court's orders because the FCC decision was only a "provisional interpretation of [FCC] access charge rules," which might be revised when the agency completed the related rulemaking procedure, *see supra* note 5, and "settle[d] definitively the controversy over the appropriate FCC access charges or tariffs owed by interexchange carriers and owners of private networks." (Pp. 22a-23a, below.)

Judge Starr, dissenting, objected to the majority's willingness to reach the merits of the dispute notwithstanding the FCC's intervening decision. Judge Starr stated:

> It has rightly been said that federal courts are not "self-directed boards of legal inquiry and research." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). Then-Judge Scalia's wise caveat about the proper role of the Third Branch is entirely appropriate here, for the question resolved by my colleagues has, in my view, been rendered moot by virtue of the supervening action of the Federal Communications Commission providing the very relief to AT&T which it has sought under the terms of the MFJ. Under settled principles of law, this undisputed fact has the inexorable legal consequence of resolving the dispute which gave rise to AT&T's repairing to Judge Greene's courtroom in the first instance. (P. 25a, below.)

Judge Starr explained:

> It matters not that the issues before the trial court and the regulatory agency are not precisely the same or that court and agency reach their (identical) results through interpretation of different bodies of law (or of consent decrees). After all, *the core value informing mootness doctrine is that a dispute, once live, has, for whatever reason, disappeared. The cold, hard fact is that AT&T has now been given administratively the relief it had sought judicially. That terminates the controversy*

and brings to an end the exercise of judicial power. (*Id.* (emphasis supplied).)

As to the allegedly "provisional" nature of the FCC's ruling, Judge Starr pointed out that the agency's decision was a final administrative action from which no appeal had been taken. (P. 31a, below.) The FCC's decision therefore had the full force of law and was binding on U S West, Bell Atlantic, and other local telephone companies. Even if the FCC were ultimately to revise its pricing rules, Judge Starr noted, "it would appear highly unlikely that the FCC would overturn the basic thrust of its Dec. 18, 1987 order" in response to Bell Atlantic's petition.[6] (*Id.*)

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the District of Columbia Circuit to exercise jurisdiction over this case, in the face of the FCC's ruling, represents an abrupt departure from previous Supreme Court and other federal court mootness decisions holding intervening actions of third parties, including administrative agencies, to divest federal courts of jurisdiction. The Court of Appeals decision is also squarely in conflict with the Fifth Circuit ruling on a similar claim of mootness in *Western Electric Co.* v. *Milgo Electronic Corp.*, 568 F.2d 1203, *reh'g denied per curiam*, 573 F.2d 255, *cert. denied*, 439 U.S. 895 (1978).

The Court of Appeals decision in this case has thereby introduced uncertainty as to the authority of federal

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[6] The majority opinion had also reasoned that the FCC's action should not be considered to moot the District Court's orders because the FCC had not addressed one of the issues that had "prompted" AT&T's motion—"the allegedly discriminatory pricing of Dial 8 lines." (P. 21a, below.) *See supra* note 2. Judge Starr responded by noting that this issue *"was not squarely resolved by the District Court's opinion and, as the case comes to us, is unripe for disposition."* (P. 29a, below (emphasis in original).)

courts to retain and exercise jurisdiction over cases in which the same relief has been provided by intervening actions of administrative agencies. This petition thus raises an important issue of federal court jurisdiction that has not been, but should be, settled by this Court.

1. This Court has consistently held that, under Section 2 of Article III of the United States Constitution, federal courts lack jurisdiction to decide questions "that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (*per curiam*). When intervening events deprive the parties of a "legally cognizable interest in the outcome," a case becomes moot. *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). A case can be rendered moot on appeal, even if a live controversy existed at the time the case was brought to court, because a federal appellate court must "apply the law as it is now, not as it stood below." *Kremens* v. *Bartley*, 431 U.S. 119, 129 (1977); *see United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

It is also settled law that intervening actions of third parties must be taken into account if they affect the justiciability of cases pending in federal court. For example, this Court has held that legislative action addressing the concerns that caused a plaintiff to resort to court will moot the claims of that plaintiff. In *Kremens* v. *Bartley*, *supra*, a class action challenged the constitutionality of Pennsylvania statutes governing voluntary admission to state mental institutions. After the District Court struck down the statutes on due process grounds and after this Court had noted probable jurisdiction, Pennsylvania enacted a new statute altering the admissions procedures to provide greater due process protections. 431 U.S. at 126. This Court held that "the enactment of the new statute clearly moots the claims of the named appellees," and vacated the lower court's decision. *Id.* at 130 (footnote omitted); *see also Diffenderfer* v.

Central Baptist Church, Inc., 404 U.S. 412 (1972) (*per curiam*) (intervening legislation); *Hall* v. *Beals*, 396 U.S. 45 (1969) (*per curiam*) (same).

This Court has also held federal court cases mooted by intervening actions other than legislation. In *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67 (1983) (*per curiam*), an all-male honor society challenged a decision of the Secretary of Health, Education and Welfare requiring the University of Miami to prohibit the society from conducting initiation ceremonies on university property. During the course of the litigation, the university announced that it would not allow the society to conduct its activities on campus, regardless of the outcome of the litigation. This Court then held that the university's unilateral action had rendered the case moot, since the action of the university left no grievance with the Secretary requiring judicial resolution. *Id.* at 70-71; *see also Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979) (*per curiam*) (intervening arbitration).

Until the majority opinion of the panel in the present case, the lower federal courts had consistently followed this Court's precedents on mootness, especially when considering cases in which the relief sought by plaintiffs had subsequently been provided by intervening actions of administrative agencies. For example, in *Iowa Power & Light Co.* v. *Burlington Northern, Inc.*, 647 F.2d 796 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), the Court of Appeals dismissed as moot a power company's request for enforcement of a contract after the Interstate Commerce Commission ("ICC") had ordered substantially the same relief that the Company had requested, even though the ICC acted pursuant to regulatory statutes rather than under contract law. *See also Detroit Firefighters Ass'n* v. *Dixon*, 572 F.2d 557 (6th Cir. 1978) (federal injunction vindicating rights under a collective bargaining agreement vacated as moot when comparable relief

granted in state arbitration and regulatory proceedings); *cf. New Mexico* v. *Goldschmidt*, 629 F.2d 665 (10th Cir. 1980) (declaratory and injunctive relief against improper allocations of highway funds vacated as moot because of intervening congressional action).

The central thrust of these precedents has been to require federal courts to conduct a pragmatic inquiry into whether the parties to litigation have a continuing, live interest in the outcome of the proceeding. When "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation" and " 'there is no reasonable expectation . . .' that the alleged violation will recur," the action must be dismissed as moot, regardless of the posture of the litigation. *See County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979) (citation omitted). Mere speculative concern for the outcome of the lawsuit, or a judicial desire to use the case as a vehicle for the promulgation of a particular legal doctrine, is not sufficient under these circumstances to sustain federal jurisdiction.

The majority opinion of the panel below completely failed to engage in such a pragmatic inquiry into the parties' continuing interest in the District Court's orders. The majority neglected to ask whether the District Court's orders provided AT&T any tangible benefit after the issuance of the FCC's ruling.

Rather, the majority relied on a series of formalistic distinctions to justify its refusal to acknowledge the impact of the intervening decision of the FCC. The majority pointed to the facts that the FCC ruling had been issued at the initiative of Bell Atlantic rather than AT&T, that the FCC had been interpreting its own rules rather than the MFJ, and that the FCC proceeding had been instituted after issuance of the District Court order rather than at some earlier date.

None of these distinctions has the slightest foundation in this Court's mootness doctrines. Indeed, many of the same points could have been made about intervening ac-

tions that this Court has previously held to render other lawsuits moot.[7] The majority's zeal to reach the merits of the underlying issue in the present case simply outran its judgment and overwhelmed its sense of self-restraint.

Likewise irrelevant (and erroneous) was the panel majority's assertion that the FCC's ruling in response to Bell Atlantic's petition was "provisional." As noted in Judge Starr's dissent, the FCC's ruling was not "provisional" as a matter of law, since it constituted a final agency action, fully binding on the operating companies of U S West, Bell Atlantic, and other local telephone companies.

More important, the mere possibility that the FCC might at some future date alter its ruling should not have influenced the panel's decision on the justiciability of this case. All agency actions, as well as all legislative acts, are "provisional" in the sense that they can be later amended or repealed. But this Court has never suggested that the possibility of amendment or repeal prevents intervening administrative or legislative actions from mooting a federal case. Nor would it be either practical or appropriate for the federal courts to be called on to predict in such cases whether an intervening administrative or legislative action were likely to be altered in the near future. *See Iron Arrow Honor Society* v. *Heckler*, 464 U.S. at 71; *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969).[8]

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[7] For instance, in *Iron Arrow Honor Society* v. *Heckler*, *supra*, the university's decision to remove the society from campus was not taken at the behest of a party to the litigation nor was the decision based upon an interpretation of the federal regulations at issue in the litigation. Still, this Court held the university's action to moot the society's claim. Similarly, in *Kremens* v. *Bartley*, *supra*, the intervening action of the Pennsylvania legislature was taken after the District Court had rendered its decision, but this Court nevertheless regarded the action as determinative of the issue of mootness.

[8] The majority's speculation that AT&T had an ongoing interest in the case because of U S West's allegedly discriminatory pricing

2. The decision of the Court of Appeals in this case has also precipitated a direct conflict with a ruling of another federal Court of Appeals. In *Western Electric Company* v. *Milgo Electronic Corp.*, 568 F.2d 1203, *reh'g denied per curiam*, 573 F.2d 255, *cert. denied*, 439 U.S. 895 (1978), a panel from the Fifth Circuit considered an issue of mootness in a strikingly similar posture. The plaintiff in *Milgo*, Western Electric (the manufacturing arm of the predivestiture AT&T), sued Milgo for infringement of a patent on the manufacture of a type of telephone equipment called a modem. Milgo counterclaimed for damages and injunctive relief, alleging that Western Electric had violated the antitrust laws by requiring customers that did not use modems of Western Electric's design to lease and install a connecting device known as a data access arrangement.

The District Court dismissed Milgo's antitrust counterclaim upon a motion for summary judgment.[9] During the course of the litigation, the FCC decided that users of non-Western Electric modems could not be required to lease an interconnection device, such as the data access arrangement. As the Fifth Circuit noted, the FCC's program "prevent[ed] [Western Electric] from categorically requiring the use of DAAs with modems not of Western's design." *Id.* at 1207-08. Thus, the Court reasoned,

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of dial 8 trunks is without significance. *See supra* note 2. As Judge Starr noted in his dissent (and as the majority did not dispute), the District Court failed to make the findings necessary to decide that U S West's pricing practices for dial 8 trunks were discriminatory. *See supra* note 6. This issue was plainly premature for appellate review. Under similar circumstances, when the primary focus of a case has become moot but there remain ancillary issues that could be developed further at the trial level, this Court has held that the appropriate disposition is to vacate the decision below and dismiss the case as moot without prejudice to any party's right to reinstitute proceedings in the District Court. *See Crowell* v. *Mader*, 444 U.S. 505 (1980).

[9] *Western Electric Co.* v. *Milgo Electronic Corp.*, 1978-1 Trade Cas. (CCH) ¶ 61,960 (S.D. Fla. 1976).

Milgo's pending request for injunctive relief was rendered moot. The subsequent FCC ruling had provided Milgo with sufficient relief to eliminate the case or controversy with respect to the injunction it had sought in District Court.

The facts of *Milgo* are analogous in almost every respect to those of the present case. In both actions, a telecommunications company was alleged to have engaged in discriminatory practices. In *Milgo*, the violation was said to arise under the antitrust laws; in this case, the MFJ provided the basis for AT&T's complaint. In both cases, an intervening action of the FCC granted the claimant administrative relief from the allegedly discriminatory practice. In neither case was the FCC's action taken at the request of the judicial claimant,[10] and in neither case was the basis of the FCC's action the same as the legal grounds for the litigation in federal court.

The only difference between *Milgo* and the present case is the outcome: In *Milgo*, the Fifth Circuit determined that the intervening FCC action mooted Milgo's claim for injunctive relief against Western Electric, whereas in this case a majority of the panel from the D.C. Circuit concluded that AT&T's claim for injunctive relief remained justiciable.

The Court of Appeals decision in the present case and the Fifth Circuit's ruling in *Milgo* provide conflicting authority as to the proper disposition of federal court cases that are affected by intervening agency actions. In view of the thousands of actions that federal administrative agencies take each year, it is highly probable that this issue will arise repeatedly in federal court litigation—and it will arise much more often if the panel deci-

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[10] Here the FCC's order was not issued at the request of AT&T. In *Milgo*, the FCC action was not prompted by a petition by any party to the *Milgo* litigation. *See In re American Telephone & Telegraph Co.*, 33 F.C.C.2d 518 (1972).

sion is permitted to stand as a beacon beckoning other federal judges in a direction opposite to this Court's precedents and those of other Courts of Appeals. This Court should therefore review this case to clarify how the federal courts should proceed under such circumstances.

3. Another factor relevant to this Court's decision whether to review this case is the sweeping impact which the opinions of the Court of Appeals and the District Court could have on the process of setting telephone rates in this country. When the District Court's decision approving the MFJ was appealed to this Court in 1982, both AT&T and the Solicitor General assured this Court that the decree would in no way interfere with the normal supervision over telephone rates exercised by the FCC and state regulators.[11] Now, however, despite the Court of Appeals' reluctance to permit the District Court to supervise telephone rates to the exclusion of the lawfully constituted regulatory bodies, the panel decision concedes to the District Court a special ratemaking authority. That authority, which grows out of the "non-discrimination" provisions of the AT&T consent decree (and which was, therefore, conferred not by Congress but by the parties to the decree), permits the District Court to exercise a concurrent jurisdiction over telephone rates at least until those agencies of the federal and state governments normally having jurisdiction over telephone rates rule otherwise in cases involving specific rates. How any resulting conflict is then to be resolved was not addressed by either the District Court or the Court of Appeals.

There is considerable doubt whether the panel majority correctly interpreted the relevant provisions of the decree. In the closing section of his dissent, Judge Starr strongly intimated that he would have adopted a different interpretation. *See* pp. 34a-36a, below. In Judge Starr's assessment, the majority's "bold construction . . . broadens

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[11] *See supra* note 3.

significantly the possible reach" of the decree, imposing "a far reaching requirement for broad price uniformity not mandated by the MFJ." (P. 35a, below.) Judge Starr went on to suggest a "better interpretation" of the decree that would have "the advantage of not unnecessarily broadening the scope of the MFJ's coverage." (P. 36a, below.)

The decision of the panel majority to ignore the traditional bounds of judicial restraint and reach out to exercise its jurisdiction in this case is particularly unfortunate in light of the panel's apparent disagreement over the proper interpretation of the MFJ and the far-reaching impact of the interpretation accepted by the majority. It is, after all, in cases of large and unpredictable import that the federal courts must be most mindful of their constitutional obligation to stay within the confines of Article III.

Here, where the FCC had already granted AT&T the same relief afforded by the District Court, the necessary and appropriate response would have been for the Court of Appeals to step back from the interpretive difficulties presented by the underlying issues in the case. The majority, however, chose to forge ahead and to issue a decision that will itself be the cause of future controversy and litigation. This Court should grant review in this case to consider whether the Court of Appeals had jurisdiction to pursue this ambitious but wholly unnecessary undertaking.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2, 1988

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5063

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC CO., INC., *et al.*,
PACIFIC TELESIS GROUP,
Appellant

AMERICAN INFORMATION TECHNOLOGIES CORP.,
NEW YORK TELEPHONE., CO., *et al.*,
Intervenors

No. 87-5064

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC CO., INC., *et al.*,
US WEST, INC.,
Appellant

AMERICAN INFORMATION TECHNOLOGIES CORP.,
NEW YORK TELEPHONE., CO., *et al.*,
MCI COMMUNICATIONS CORPORATION,
Intervenors

No. 87-5110

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC CO., INC., *et al.*,
BELL ATLANTIC,

Appellant

Appeals from the United States District Court
for the District of Columbia

(Civil Action No. 82-00192)

Argued February 19, 1988

Decided May 10, 1988

James vanR. Springer, with whom *David I. Shapiro* was on the brief, for appellant U S West, Inc. *Robert B. McKenna* also entered an appearance for appellant US West in 87-5064.

Robert V. R. Dalenberg, with whom *Marion J. Stanton* and *Randall E. Cape* were on the brief, for appellant Pacific Telesis Group. *Paul H. White*, *Margaret deB. Brown* and *Stanley J. Moore* also entered appearances for appellant Pacific Telesis Group in 87-5063.

James R. Young, with whom *Robert A. Levetown*, *John M. Goodman*, *James G. Pachulski* and *Mark J. Mathis* were on the brief, for appellant Bell Atlantic.

Robert J. Wiggers, Attorney, U.S. Department of Justice, with whom *Deborah A. Garza*, Counselor to the Assistant Attorney General, *Barry Grossman*, *Robert B. Nicholson* and *Nancy C. Garrison*, Attorneys, U.S. Department of Justice, were on the brief, for appellee United States of America.

David W. Carpenter, with whom *Francine J. Berry*, *Mark C. Rosenblum* and *Howard J. Trienens* were on the brief, for appellee American Telephone and Telegraph Company. *Jonathan S. Hoak* and *Robert D. McLean* also entered appearances for appellee American Telephone and Telegraph Company in 87-5063, 87-5064 and 87-5110.

Alfred Winchell Whittaker, with whom *John Thorne* was on the brief, for intervenor Ameritech.

Chester T. Kamin, *Michael H. Salsbury*, *Thomas S. Martin*, *Anthony C. Epstein* and *Carl S. Nadler* were on the brief for intervenor MCI Communications Corporation.

Saul Fisher and *Martin J. Silverman* were on the brief for intervenor NYNEX Telephone Companies.

Before: MIKVA, EDWARDS and STARR, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Dissenting opinion filed by *Circuit Judge* STARR.

EDWARDS, *Circuit Judge*: On October 29, 1986, the General Services Administration ("GSA") issued a request for bids to provide fourteen switches that are part of the Government's private telephone network, the Federal Telecommunications System ("FTS"). These switches are used to transfer calls originating in Government offices to long-distance lines leased from an interexchange carrier, as well as to transfer calls carried on long-distance lines to their destination, whether they terminate in another Government office or at some location outside the FTS network. On November 6, 1986, American Telephone and Telegraph Company ("AT&T") filed an Emergency Motion with the District Court, seeking an order enjoining U S West, Inc,[1] from offering GSA

[1] U S West is one of the seven Regional Holding Companies that were assigned ownership of the twenty-two Bell Operating Com-

access to local exchange facilities for completing calls off the FTS network at a lower price than it charged AT&T and other interexchange carriers for local exchange access, provided that GSA purchased its switching services from U S West rather than from AT&T or another interexchange carrier. AT&T also asked the court to enjoin U S West from offering GSA trunk lines from the facility servicing a Government office building to the FTS network switch at no charge if GSA chose to have U S West provide the switch, while requiring GSA to pay for such lines if an interexchange carrier supplied the switch. AT&T argued that U S West had used both of the pricing practices it sought to have enjoined when U S West successfully bid for contracts to provide four other FTS switches, that U S West was likely to repeat these practices when responding to GSA's new bid request, and that both pricing practices violated section II(B) and Appendix B, section B(1), of the Modification of Final Judgment ("MFJ") which ended the Government's antitrust suit against AT&T.[2] The District Court granted AT&T's Emergency Motion. *United States v. Western Elec. Co.*, Civ. No. 82-0192 (D.D.C. Nov. 26, 1986), *reprinted in* Joint Appendix ("J.A.") 18. U S West has appealed.

On December 23, 1986, Bell Atlantic moved for an order clarifying the District Court's Order of November 26, 1986, and for a stay with respect to further application of the Order to services Bell Atlantic was currently providing, until Bell Atlantic was able to obtain a ruling from the Federal Communications Commission ("FCC")

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panies ("BOCs") when AT&T divested itself of them. References to U S West and other Regional Holding Companies include their BOC subsidiaries.

[2] The MFJ is reprinted following the District Court's opinion approving, with modifications, the antitrust settlement agreement between AT&T and the Government. *See United States v. AT&T*, 552 F. Supp. 131, 226 (D.D.C. 1962), *aff'd mem. sub nom. Maryland v. United States*, 469 U.S. 1001 (1988).

on the appropriate access charges for its services. The District Court denied Bell Atlantic's motion for clarification, because it deemed the legal principles enunciated in its earlier Order "clear" and "not fact-specific," so that "there [was] . . . no basis for distinguishing between U S West and Bell Atlantic." *United States v. Western Elec. Co.*, Civ. No. 82-0192 (D.D.C. Mar. 31, 1987), *reprinted in* J.A. 29, 30. The court also denied Bell Atlantic's motion for a stay, because it found that its earlier Order would not compel the Regional Holding Companies to act contrary to state or federal regulations. Bell Atlantic has appealed.

We affirm the District Court's Order of November 26, 1986. We agree that the MFJ's nondiscrimination provisions prohibit a Regional Holding Company or a BOC from offering GSA local exchange access or trunk lines connecting GSA telecommunications facilities to FTS switches at lower rates than it charges interexchange carriers. We also affirm the District Court's Order of March 31, 1987, denying Bell Atlantic's motion for clarification and a stay. In doing so, however, we do not embrace statements made by the court in denying clarification that might suggest that it was resolving matters not before it in the former proceeding.

I. BACKGROUND

A. *U S West's Provision of FTS Switches to GSA*

In June 1985, GSA requested bids to supply FTS switches in Denver, Albuquerque, Salt Lake City, and Phoenix. At the time, switching services were provided by AT&T Common Control Switching Arrangements ("CCSAs") in those four cities. GSA accepted U S West's proposal over AT&T's offer because it promised savings of between $77,000 and $150,000 per month.

AT&T alleges that U S West was able to undercut AT&T's offer at least partly because U S West engaged

in two discriminatory pricing practices that violated the MFJ.[3] AT&T first charges that U S West offended the MFJ by offering GSA access to local, public exchange networks, if GSA chose to have U S West supply the FTS switches for those cities, at a lower price than AT&T would have to pay (and then bill GSA) if GSA purchased switching services from AT&T. If AT&T supplied the FTS switch, then there is no question that AT&T would be required to pay, pursuant to FCC regulations, the Feature Group A tariffs that apply to interexchange calls that leave the FTS network and terminate within the local exchange network. These tariffs are high, because, since divestiture, the FCC, by means of such access charges, has compelled interexchange service users to pay more than the cost of that service and thus to subsidize local telephone service users.

Second, AT&T claims that U S West offered to provide GSA with Dial 8 lines connecting the Centrex serving a Government office to the local FTS switch free of charge if GSA had U S West provide the switch. In contrast, if GSA decided to have AT&T supply the FTS switch, AT&T would have to obtain Dial 8 lines under applicable access tariffs (or pay simulated access charges for facilities leased under Shared Network Facilities Agreements) at a substantial monthly charge. That charge would have to be passed on to GSA if GSA purchased AT&T's switching services. AT&T contends that U S West's offer constituted illicit price discrimination under the MFJ.

B. *Legal Proceedings*

On October 29, 1986, GSA solicited bids for contracts to provide fourteen FTS switches. Two of the switches were in cities served by U S West. On November 6,

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[3] AT&T has asked the Department of Justice to institute enforcement proceedings against U S West for its alleged violations of the MFJ. The Justice Department has not concluded its investigation. *See* Brief of Defendant-Appellee AT&T at 12-13.

1986, AT&T filed an Emergency Motion with the District Court. AT&T sought an order enjoining U S West, under the terms of the MFJ, from engaging in the two forms of alleged price discrimination it used in securing contracts for four FTS switches in Denver, Albuquerque, Salt Lake City, and Phoenix. Specifically, AT&T proposed that U S West be ordered:

> (1) to provide access and other local exchange facilities for the Federal Telecommunications System network and other private networks at the same rates, regardless of which carrier a customer selects to provide switching functions, and (2) publicly to announce the access and other local charges that will be the basis for any U S West responses to the General Services Administration's pending requests for proposals to replace switching systems on the FTS network at least 15 days before the submission of those responses.

Proposed Order, *reprinted in* J.A. 35. U S West and five other Regional Holding Companies (which were not parties to the suit) filed opposing responses.

On November 26, 1986, the District Court granted AT&T's Emergency Motion and adopted its Proposed Order. *United States v. Western Elec. Co.*, Civ. No. 82-0192 (D.D.C. Nov. 26, 1986), JA. 18. The trial court enjoined U S West from offering Dial 8 lines or local exchange access to GSA at lower rates than it charged AT&T. The District Court found that both forms of price discrimination contravened two complementary provisions of the MFJ.

Section II of the MFJ, entitled "BOC Requirements," reads in relevant part:

> A. Subject to Appendix B, each BOC shall provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled,

> tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates.
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> B. No BOC shall discriminate between AT&T and its affiliates and their products and services and other persons and their products and services in the:
>
> . . .
>
> 3. interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service.

United States v. AT&T, 552 F. Supp. at 227 (reprinting MFJ). The pertinent section of Appendix B, which is entitled "Phased-In BOC Provision of Equal Exchange Access," reads as follows:

> B.1. The BOCs are ordered and directed to file, to become effective on the effective date of the reorganization described in paragraph I(A)(4), tariffs for the provision of exchange access including the provision by each BOC of exchange access for AT&T's interexchange telecommunications. Such tariffs shall provide unbundled schedules of charges for exchange access and shall not discriminate against any carrier or other customer. Such tariffs shall replace the division of revenues process used to allocate revenues to a BOC for exchange access provided for the interexchange telecommunications of BOCs or AT&T.

Id. at 233 (reprinting MFJ).

The District Court held that charging different rates for exchange access and Dial 8 lines to AT&T and GSA constitutes discrimination "between AT&T and . . . other persons" under section II(B) and discrimination "against any carrier or other customer" under section B(1) of Appendix B. The court also noted that compliance with its ruling would almost certainly not cause U S West to run afoul of state or federal regulations. If a conflict did arise, the court said, then U S West should seek to

resolve the conflict in favor of the MFJ; if that were impossible, then further guidance should be sought from the court. Slip op. at 8 & n.8, J.A. 25.

On December 23, 1986, Bell Atlantic moved for clarification of the Order granting AT&T's Emergency Motion as it might apply to Bell Atlantic. It also requested a stay of the Order as it applied to services Bell Atlantic then provided, until Bell Atlantic obtained a ruling from the FCC regarding the proper local access charges for its services. The District Court denied Bell Atlantic's motion on March 31, 1987. *United States v. Western Elec. Co.*, Civ. No. 82-0192 (D.D.C. Mar. 31, 1987), J.A. 29, The court found its earlier Order sufficiently clear and saw no need for a stay in view of Bell Atlantic's inability to demonstrate a "collision" between the court's Order and state or federal regulatory schemes, particularly in light of Bell Atlantic's admission that it would comply with the Order. *Id.*, slip op. at 2, J.A. 30.

U S West and Bell Atlantic filed timely appeals with this court. On December 18, 1987, the FCC issued its provisional response to a request by Bell Atlantic for clarification of the applicability of federal and state access tariffs to FTS switching services provided by the Electronic Tandem Switch ("ETS") of a Regional Holding Company. *Bell Atlantic Petition*, 2 F.C.C. Rcd. 7458 (1987). The FCC tentatively ruled that Regional Holding Companies providing FTS switching must, under FCC regulations, pay the same local access charges that AT&T is required to pay when it provides FTS switching. Hence, the FCC's provisional ruling was in accord with the District Court's decision concerning access charges, although it was grounded in an interpretation of its own regulations rather than the MFJ.

II. Analysis

A. *The Applicability of the MFJ*

This court has held that the "construction of a consent decree is essentially a matter of contract law," *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984), and that this principle applies to judicial interpretations of the MFJ. *United States v. Western Elec. Co.*, 797 F.2d 1082, 1089 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1384 (1987). Hence, the District Court's reading of the MFJ is subject to *de novo* review. *Id.* at 1089.

In *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), the Supreme Court stated that "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." In ascertaining the MFJ's scope, however, "reliance upon certain aids to construction is proper, as with any other contract," including "the circumstances surounding the formation of the consent decree." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975). Our interpretation of the MFJ must therefore be grounded in the text of the agreement and contemporaneous understandings of its purposes, not in our own conception of wise policy.

The District Court relied upon both of these legitimate sources in reaching its decision. In the court's view, section B(1) of Appendix B and section II(B)(3) of the MFJ "condemn on their face as illegal under the decree discriminatory pricing schemes" of the sort AT&T alleged that U S West was likely to employ. *United States v. Western Elec. Co.*, Civ. No. 82-0192, slip op. at 4-5 (D.D.C. Nov. 26, 1986), J.A. 21-22 In addition, the court said, the acknowledged aims of the MFJ would not be served by allowing a BOC or a Regional Holding Company to discriminate against AT&T:

> [The MFJ] was not intended to prevent only discrimination in favor of AT&T or among interexchange carriers, while permitting discrimination against AT&T. This assertion was rejected several years ago, *see United States* v. *Western Electric Co.*, 583 F. Supp. 1257, 1259 n.10 (D.D.C. 1984), and it is entirely inconsistent with the basic scheme of the decree that the competitive telecommunications markets were to operate on the basis of level playing fields.

Id., slip op. at 5 n.5, J.A. 22.

We agree with the District Court that the MFJ applies to the charging of different rates by a BOC or a Regional Holding Company for local exchange access or Dial 8 lines, depending upon whether a purchaser such as GSA buys its switching services from the BOC or Regional Holding Company rather than from AT&T or some other interexchange carrier. Although relevant sections of the MFJ are not entirely free from ambiguity, we find the District Court's reading of them to be eminently reasonable. The court's reading, moreover, comports better with the purposes of the MFJ, as evidenced by its text and by contemporaneous statements of its objectives.

Section II(B)(3) of the MFJ proscribes discrimination by a BOC[4] "between AT&T . . . and other persons . . . in the interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service." The term "other persons" is extremely broad. Certainly it is sufficiently elastic to encompass GSA. Nor is there reason to read limitations into the term that the MFJ's drafters did not supply. Although section II(A) requires the BOCs to provide "to

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[4] This prohibition extends with equal force to the seven Regional Holding Companies. *See United States v. Western Elec. Co.*, 797 F.2d 1082, 1087-89 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1384 (1987).

all interexchange carriers and information service providers" exchange access and exchange services of the same sort that they provide to AT&T, there is no indication, either in the text of the MFJ or in statements made in connection with its composition, that "other persons," as that term is used in section II(B), was meant to serve merely as a proxy for "all interexchange carriers and information service providers." Indeed, the natural inference from the use of the broader term "other persons" is that the parties to the MFJ meant it to bear wider signification; else they would simply have repeated section II(A)'s more qualified reference to "interexchange carriers and information service providers."

The District Court's construction of the term "other persons" is bolstered by section B(1) of Appendix B, as well as by the fact that section II(A), which contains the narrower reference to "interexchange carriers and information service providers," was expressly made "[s]ubject to Appendix B." Appendix B, section B(1), provides that BOC tariffs for the provision of exchange access "shall not discriminate against any carrier or other customer." The phrase "any carrier or other customer" appears at least as capacious as section II(B)'s reference to "other persons." In addition, because it is not immediately preceded by a narrower description of a class to which certain nondiscrimination provisions apply, there can be little doubt that the phrase "any carrier or other customer" was intended to be read literally. There is certainly no doubt that AT&T falls within the class it delimits.

The District Court's interpretation of the MFJ finds additional support in the court's earlier decision in *United States v. Western Electric Co.*, 583 F. Supp. 1257 (D.D.C. 1984). In that case, the court prevented Pacific Bell—a BOC in competition with AT&T—from refusing to provide access lines to coinless telephones that AT&T wanted to install at the Los Angeles airport and other

sites in order to compete with Pacific Bell's coinless telephones. The court stated:

> The decree requires the Operating Companies to grant nondiscriminatory exchange access to all interexchange carriers. That provision was designed to make it impossible for a "bottleneck" monopoly to prevent competitors from providing service by refusing to provide the necessary connections. If . . . an Operating Company . . . had the authority to determine when it would or would not provide access and to whom, it would become the arbiter of future inter-LATA [Local Access and Transport Area] services; it could shape the inter-LATA competition to suit its needs or interests, and it could frustrate such competition altogether. In short, it could act as the Bell System was alleged to have acted prior to divestiture.
>
> Pacific Bell's assertions of authority to refuse to grant access to its lines to AT&T thus not only violate the decree; they strike at its heart.

Id. at 1259 (footnotes omitted).

If a BOC or a Regional Holding Company were permitted to charge different customers different rates for exchange access or local exchange facilities, depending upon whether those customers purchased other products or services sold by the BOC or Regional Holding Company, then it could, in the court's terms, exploit its "bottleneck" monopoly over exchange access and local exchange facilities to the detriment of its competitors and ultimately of consumers of telecommunications services. The difference between charging a competitor a markedly higher price for access and denying access altogether is, after all, a difference of degree, not of kind. If U S West were allowed to employ the pricing practices that AT&T alleged it had used and would continue to use, U S West's actions would strike at the MFJ's

heart just as surely as did Pacific Bell's denial of exchange access for AT&T's coinless telephones. It is clearly reasonable to read the MFJ's nondiscrimination provisions in light of its fundamental purpose to stymie efforts by a local monopoly to use its stranglehold on essential facilities and services to thwart effective competition in areas where its monopoly position was not protected by the MFJ. The District Court's construction of those provisions, informed by the court's recognition of the MFJ's aims, is therefore a sound and sensible one.

In resisting this conclusion, Bell Atlantic and U S West object that the MFJ's equal access and nondiscrimination requirements were not intended to apply to "owners of private telecommunications systems." *See* Brief for Appellant Bell Atlantic at 17 n.28; Reply Brief at 17-18; Brief for Appellant U S West at 29-31. They point out that the District Court, in approving the MFJ, noted that "[s]everal radio common carriers and owners of private communications systems" had contended that section II(A)'s equal access requirements should apply to them, and that the court found "justified the parties' decision not to address these specialized demands." 552 F. Supp. at 196 n.269.

We do not read this footnote as denying either that GSA belongs to the class of "other persons" under section II(B) or that the nondiscrimination requirement of section B(1) of Appendix B may be implicated when a BOC provides GSA with exchange access. First of all, the trial court's discussion in this note refers to the exchange access requirements of section II(A), which confers rights solely upon "all interexchange carriers and information service providers." The court does not refer to the nondiscrimination provision of section II(B), which forms one focus of the present controversy and which uses the broader term "other persons." Second, the trial court's reference in the footnote to the comments of certain owners of highly specialized private networks that provide telecommunications services to industrial users

in areas not served by public systems suggests that its statement in the footnote was only addressed to the users of these specialized systems. This inference is bolstered, third, by the court's rejection of the appellants' argument, because the judge who rejected their argument was the very same judge who authored the footnote to which they appealed. In any event, this court is not bound by the District Court's earlier comments about the proper interpretation of some portion of the MFJ. Although there seems to us no conflict between the court's views when it approved the MFJ and when it issued the Order that gave rise to the present case, even if the court's views were at odds we would not be obliged to follow its initial opinion. The appellants' reliance on this footnote is therefore misplaced.[5]

B. *U S West's Need for "Tails"*

U S West argued before the District Court, and again on appeal, that even if the MFJ's nondiscrimination provisions applied to the bids it submitted to GSA, it was

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[5] We are equally unimpressed by the appellants' invocation of a line from the Competitive Impact Statement issued by the Department of Justice which reads: "Taken together, the nondiscrimination provisions are designed to ensure that the divested BOCs do not abuse their status as regulated franchised monopolies to disadvantage competitors of AT&T in the provision of intercity services, information services, or in the provision of telecommunications equipment for purchase by a BOC or its customers." Competitive Impact Statement, 47 Fed. Reg. 7175-76 (1982). Although the Justice Department's views are relevant to a proper interpretation of the MFJ, there is no indication that the Justice Department intended the foregoing sentence to be a definitive, comprehensive statement of the MFJ's reach. Indeed, the very next sentence reads: "It is therefore the intent of the Department of Justice that this provision be construed broadly to encompass all potential areas of favoritism, subtle as well as overt, that may arise in relationships between the divested BOC's and AT&T and its competitors." 47 Fed. Reg. 7176. In view of this countervailing statement and the Competitive Impact Statement's imprecision, we decline to alter our reading of the MFJ based solely on the sentence highlighted by the appellants.

not guilty of discriminatory pricing. U S West contends that because it would have to purchase a costly "tail" from the end of AT&T's long-distance line to its ETS if it provided the FTS switch, while AT&T would not need a "tail" if its CCSA provided FTS switching, the lower price it offered GSA for exchange access was a legitimate means of reducing the competitive advantage AT&T enjoyed as a result of its supplying the long-distance lines used by GSA.

The District Court tersely rejected this argument. "The decree's nondiscrimination provisions," the court said, "do not focus on the question what overall 'packages' the several competitors are able to offer but on the issue whether each element of exchange access provided by a Regional Company is priced equally regardless of who supplies the other elements." *United States v. Western Elec. Co.*, No. 82-0192, slip op. at 5 n.5 (D.D.C. Nov. 26, 1986), J.A 22 We agree Appendix B, section B(1), of the MFJ specifically requires that BOC tariffs "provide unbundled schedules of charges for exchange access [that do] not discriminate against any carrier or other customer." It plainly mandates nondiscriminatory charges for *each element* of service, not merely nondiscriminatory charges for some combination of services.

C. *Dial 8 Lines Provides Exchange Access*

U S West argues that the Dial 8 lines it allegedly agreed to provide free of charge to GSA if GSA purchased its FTS switching services do not afford "exchanges access," and thus that the prices charged for them are not governed by the MFJ's nondiscrimination provisions. Hence, the District Court's Order exceeded the court's authority by requiring the nondiscriminatory pricing of Dial 8 lines. *See* Brief for Appellant U S West at 40-44; Reply Brief at 16-17.

We find this argument meritless. First of all, section II(B)(3) does not speak of "exchange access." It sim-

ply forbids discrimination between AT&T and other persons in the "interconnection and use of the BOC's telecommunications services and facilities or in the charges for each element of service." There seems little doubt that the lease or purchase of Dial 8 lines from a BOC, which link a Centrex or PBX servicing a Government office to the FTS switch, involves the "use of the BOC's telecommunications service and facilities." To the extent that the District Court's holding rests on section II(B)(3), it is immune from attack on this score.

Even if one focuses exclusively on section B(1) of Appendix B, however, the same result follows. That section does refer to "exchange access," which is defined extremely generously in section IV(F) of the MFJ:

> F. "Exchange access" means the provision of exchange services for the purpose of originating or terminating interexchange telecommunications. Exchange access services include any activity or function performed by a BOC in connection with the origination or termination of interexchange telecommunications, including but not limited to, the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, directory services, testing and maintenance of facilities and the provision of information necessary to bill customers.

United States v. AT&T, 552 F. Supp. at 228 (reprinting MFJ).

We see no reason to upset the District Court's finding that Dial 8 lines are used in "the organization or termination of interexchange telecommunications." Dial 8 lines are necessary, for example, to initiate long-distance calls originating in a Government office and terminating in the local, public exchange network of a city located in a different exchange area. They therefore fall within the MFJ's roomy definition of "exchange access."

It warrants emphasis, moreover, that this reading of the MFJ's definition of "exchange access" best serves the purposes of the MFJ. If some arbitrary limitation were read into the definition—as U S West suggests we do by excluding all "[f]acilities 'below' the [FTS] switch, such as Centrexes and their connections to the FTS switch," Brief for Appellant U S West at 42—then a BOC or a Regional Holding Company could use its monopoly control of whatever services were excluded to obtain an unfair competitive advantage over its rivals. That is precisely the evil the MFJ was designed to forestall.[6]

D. *The District Court's Alleged Instrusion on State and Federal Regulatory Authority*

The appellants raise a chorus of complaints about potential conflicts between the District Court's nondiscrimination Order and state and federal regulations. They also contend that the District Court's command that they seek to resolve any conflicts that arise in favor of the court's reading of the MFJ, even though they would prefer not to carry that message to regulatory authorities, infringes their First Amendment right to freedom of speech. They would have us issue a sweeping ruling setting forth the proper domains of the courts, the states, and the FCC, resolving constitutional problems that might arise, and defining the extent to which courts may engage in what they portray as the essentially legislative activity of ratemaking.

We are constrained to turn a deaf ear to these complaints. As the Regional Holding Companies' overnight accommodation to the District Court's Order demon-

[6] In this regard, it is important to note that the District Court's Order has only prospective effect. It bars the discriminatory pricing of Dial 8 lines, without finding conclusively that U S West earlier engaged in price discrimination in bidding successfully for four FTS switching contracts in 1985. The question whether U S West violated the MFJ at that time remains open.

strates, there was in fact no conflict between the Order and state or federal regulations. And the FCC's provisional ruling on access charges in *Bell Atlantic Petition*, 2 F.C.C. Rcd. at 7458, is in complete accord with the court's Order. Should the FCC alter its position when it completes its rulemaking proceedings on exchange access tariffs and private branch exchange (PBX) surcharges, placing the Regional Holding Companies in a position where continued compliance with the court's Order would cause them to transgress FCC regulations, then the Regional Holding Companies may return to the District Court for relief. If they are dissatisfied with that court's disposition of their claims, they may appeal to this court. Barring an actual conflict, however, we are powerless to act. It is not our function to resolve phantom disputes or to issue dicta on a range of merely hypothetical controversies.

E. *The District Court's Denial of Bell Atlantic's Motion for Clarification*

In denying Bell Atlantic's motion for clarification, the District Court wrote: "The legal principles set forth in the November 26 Memorandum are clear. Those principles are not fact-specific, and there is therefore no basis for distinguishing between U S West and Bell Atlantic." *United States v. Western Elec. Co.*, Civ. No. 82-0192, slip op. at 2 (D.D.C. Mar. 31, 1987), J.A. 30. It is clear that the trial court acted properly in denying Bell Atlantic's motion for clarification.[7] However, the appellants claim that the trial court's opinion might be read to suggest that the court's first Order not only required the elimination of price discrimination between AT&T and GSA in regard to local exchange access and Dial 8 lines,

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[7] None of the parties has objected specifically to the District Court's refusal to grant a stay, and we see no reason to fault the court for not doing so. Accordingly, we affirm that portion of the court's Order as well.

but that it offered a judgment with respect to other price disparities as well, such as those between residential and commercial customers, or those between interexchange carriers and information service providers, even though such disparities were required by state or federal regulations. We disagree. We express no views on matters that were not directly raised by AT&T's Emergency Motion, and we do not read the trial court's Order and Memorandum to do so. We reiterate that the trial court's Order does not extend beyond the questions presented by the provision of exchange access and Dial 8 lines to GSA at lower rates than those charged to AT&T only to avoid misunderstandings and to allay the appellants' apprehensions.

F. *Bell Atlantic's Claim of Mootness*

In its Reply Brief, Bell Atlantic belately contended that the parties' dispute over the applicable tariffs for local exchange access had been rendered moot by the FCC's provisional declaratory ruling in *Bell Atlantic Petition*, 2 F.C.C. Rcd. 7458 (1987). Of the many parties to this case, only Bell Atlantic suggested that the FCC's decision would have this effect. We find the suggestion meritless.

AT&T brought suit in the District Court to vindicate its rights *under the MFJ*. The District Court was the only forum in which AT&T could obtain the relief it sought, and the District Court correctly issued the injunction AT&T requested. Only after the District Court handed down its decision did Bell Atlantic petition the FCC for clarification of the agency's access charge rules, in order to ascertain whether they were in conflict with the District Court's decision. AT&T never sought relief from the FCC, and the FCC did not purport to provide any relief. Indeed, it lacked authority to issue an order of the sort AT&T desired, since it was not empowered to enforce the terms of the MFJ. The FCC merely assured

Bell Atlantic that agency regulations were not inconsistent with the District Court's decision. Furthermore, the FCC did not even address the other issue that prompted AT&T's suit in the District Court—the allegedly discriminatory pricing of Dial 8 lines. Thus, the FCC's declaratory ruling can hardly be said to moot AT&T's suit under the MFJ in federal court.[8]

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[8] The two cases cited in dissent do not offer authority to the contrary. *Iowa Power & Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796 (8th Cir. 1981), *cert. denied*, 465 U.S. 907 (1982), involved a dispute between a power company and a railroad over the proper rate for shipping coal between a mine and a generating plant. When the railroad attempted to charge more than the rate the parties had agreed upon, the power company complained to the Interstate Commerce Commission ("ICC"). The ICC ruled initially that the railroad could charge more than the contract rate, although not as much as it would have liked. Only when it was denied relief by the ICC did the power company repair to federal court. It sought an injunction forbidding the railroad from breaching its contract. The district court *denied* injunctive relief, a divided panel of the court of appeals reversed, and, shortly thereafter, decided to rehear the case. While the petition for rehearing was pending, the ICC requested and received a remand of its earlier decision, which was the subject of a petition for review in the same court of appeals. Upon reconsideration, the ICC concluded that it had erred. It thereupon prohibited the railroad from charging more than the contract rate. Because the power company obtained from the ICC what it had sought in federal court after being rebuffed by the ICC—enforcement of its contract—the court of appeals dismissed the power company's contract action as moot.

Iowa Power & Light differs from the instant case in several salient respects. The same party there sought relief from both the agency and the courts, and it did so on the basis of substantially the same legal arguments. AT&T never petitioned the FCC for a ruling on the application of its regulations, and the arguments it made in the District Court differed markedly from those it might have made before the FCC, as did the relief it requested. In *Iowa Power & Light*, the power company secured exactly the same relief from the ICC that it had sought in court; AT&T was not awarded any relief by the FCC, and the FCC's declaratory ruling assuaging Bell Atlantic's fears of a conflict between the

The FCC's ruling, moreover, was only a provisional interpretation of its access charge rules. In its Notice of Proposed Rulemaking, issued the same day as its decision in *Bell Atlantic Petition*, the FCC twice described that

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District Court's order and FCC regulations falls far short of the durable remedy that AT&T obtained under the MFJ in court. The dispute in *Iowa Power & Light*, moreover, was centered in the ICC. The power company's suit for an injunction after it lost before the ICC was *an attempt to circumvent the ICC's ruling*, and it is by no means clear, as the courts' disagreements reveal, that the courts had jurisdiction to entertain the power company's suit. In this case, by contrast, AT&T properly sought relief in the District Court, whose authority to hear the case was plain. It was another party—Bell Atlantic—that subsequently went to the FCC. And it did so *not* in an attempt to undercut the District Court's order, but to ensure that FCC regulations were in accord with it and, if they were not, to request that the FCC modify those regulations to align them with the court's order. *See* 2 F.C.C. Rcd. at 7458 ¶ 4. The FCC did not purport to pass judgment on the question the District Court confronted, nor did it pretend to intrude on the court's authority or to grant the same remedy the court had already given. This is a far cry from the situation in *Iowa Power & Light*, where the court could—at best—have issued the same order that the agency had already issued.

Detroit Fire Fighters Ass'n v. Dixon, 572 F.2d 567 (6th Cir. 1978), is even feebler authority. A firefighters union filed three suits to enjoin the promotion of 36 minority employees in violation of a collective bargaining agreement. The union first obtained a preliminary injunction from the district court. While an appeal was pending, an arbitrator found that the proposed promotion offended the collective bargaining agreement to which the union was a party, and a state court issued a preliminary injunction requiring the defendants to comply with the arbitrator's award. Also, while the appeal was pending in federal court, the union obtained a ruling from a state agency that the promotion constituted an unfair labor practice under state law, along with a state court order enforcing the agency's decision. When the federal court of appeals came to review the district court's grant of a preliminary injunction, there was nothing left for it to do, *since all of the parties conceded that the case was moot. See id.* at 559. The court therefore had no alternative but to dismiss the case and vacate the decision of the district court. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *Detroit Fire Fighters Association*, there-

decision as "tentative." *Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange*, 2 F.C.C. Rcd. 7441, 7447, 7456 n.71 (1987). The FCC stated that it would consider amending the rules on which its tentative decision was based, and that it therefore wished "to examine this issue in light of the complete record developed in response to this Notice, and in the context of the broader issues concerning the access charge treatment of off-net or 'leaked' traffic from private networks and private lines generally." *Id.* at 7456 n.71. The FCC's decision in *Bell Atlantic Petition* was therefore merely an interim ruling. It did not purport to settle definitively the controversy over the appropriate FCC access charges or tariffs owed by interexchange carriers and owners of private networks using PBXs.

More important, it did not purport to settle the parties' dispute over the proper interpretation of the MFJ's nondiscrimination provisions. None of the parties explicitly denies that AT&T's action was properly raised in the District Court, and that the court acted properly in ruling on it. Nevertheless, Bell Atlantic seems to deny this proposition implicitly by arguing, under the guise of a mootness claim, what other appellants assert more forthrightly: that the FCC has primary jurisdiction to resolve all disputes within the compass of the MFJ.

In response, two points warrant mention. First, the appellants' primary-jurisdiction argument was not litigated below, and we have no license to address it, whether or not it is clothed in the unassuming garb of a mootness claim. Second, the extensive case law growing out of the

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fore affords no parallel to the instant case, where the FCC did not purport to supply relief, where the effect of its ruling differed from that given by the District Court, where AT&T did not even petition the FCC for a favorable ruling, and where all the parties, save one, rightly insist that AT&T's suit under the MFJ is still very much alive.

AT&T divestitures tacitly rejects the critical premises underlying the appellants' primary-jurisdiction argument. The District Court has repeatedly decided suits brought under the MFJ, even though the questions they raised might have overlapped certain areas within the FCC's jurisdiction. Until the Supreme Court instructs us that the District Court no longer possesses authority to resolve disputes arising under the MFJ, we see no reason to doubt that the District Court acted properly in this case and in similar cases. The MFJ supplies a basis for suit independent of FCC regulations and Code provisions under which they are promulgated. It comprises different standards, and affords different forms of relief. And, most importantly, the FCC has no original or primary jurisdiction to construe or apply the terms of the MFJ. Disputes under the MFJ are matters for the court to decide, just as was the original lawsuit that led to the MFJ. The present action was properly before the District Court, and the FCC's tentative declaratory ruling cannot render its decision nugatory, whether by providing similar (albeit only provisional) relief or by displacing the District Court's jurisdiction.

III. Conclusion

The District Court was correct in ruling that the MFJ's nondiscrimination provisions bar a Regional Holding Company from offering exchange access and Dial 8 lines to GSA at rates below those which AT&T would have to pay for the same services. The court also acted properly in denying Bell Atlantic's motion for clarification and a stay. We therefore affirm both of the District Court's Orders, with the qualification noted in section II(E) of this opinion.

Affirmed.

STARR, *Circuit Judge*, dissenting: It has rightly been said that federal courts are not "self-directed boards of legal inquiry and research." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). Then-Judge Scalia's wise caveat about the proper role of the Third Branch is entirely appropriate here, for the question resolved by my colleagues has, in my view, been rendered moot by virtue of the supervening action of the Federal Communications Commission providing the very relief to AT&T which it had sought under the terms of the MFJ. Under settled principles of law, this undisputed fact has the inexorable legal consequence of resolving the dispute which gave rise to AT&T's repairing to Judge Greene's courtroom in the first instance. I therefore respectfully dissent.

I

Before entering the labyrinthine maze of switches, access charges and the like, it behooves us to reflect on one fundamental precept with which the court, I believe, agrees, since it fails directly to call it into question: *It cannot reasonably be gainsaid that action by a regulatory agency moots an appeal when the agency grants the same relief sought through judicial action.* It matters not that the issues before the trial court and the regulatory agency are not precisely the same or that court and agency reach their (identical) results through interpretation of different bodies of law (or of consent decrees). After all, the core value informing mootness doctrine is that a dispute, once live, has, for whatever reason, disappeared. The cold, hard fact is that AT&T has now been given administratively the relief it had sought judicially. That terminates the controversy and brings to an end the exercise of judicial power.

A couple of cases serve to make this rather straightforward point. For example, in *Iowa Power & Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), the court dis-

missed as moot an appeal of a contract enforcement action solely because the Interstate Commerce Commission had published a decision holding that the rate agreed to by the parties was just and reasonable within the meaning of applicable statutory provisions. Accordingly, the appeals court dismissed the action as moot and vacated the District Court's judgment. *Detroit Fire Fighters Ass'n v. Dixon*, 572 F.2d 557 (6th Cir. 1978) is also illustrative. There, certain plaintiffs alleged that Detroit's fire department had engaged in racially discriminatory conduct. The District Court agreed and entered an injunction. While the fire department's appeal was pending, an arbitrator concluded that the practices which the trial court had condemned as discriminatory were also violative of a governing collective bargaining agreement. State court orders approving the arbitrator's award and finding an unlawful labor practice therefore mooted the federal case on appeal. The Sixth Circuit ordered the District Court's injunction (which had prospective effect beyond the life of the collective bargaining agreement) dissolved, notwithstanding plaintiff's arguments that the District Court's injunction afforded it greater relief than the State Court's orders.[1]

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[1] My colleagues attempt to distinguish these cases on their facts, but does so on points irrelevant to the analysis required under mootness doctrine. For example, the court's observations that, unlike the situation in *Detroit Fire Fighters Ass'n*, AT&T did not petition the FCC for a favorable ruling or that only one party argued that the case is moot are, with all respect, beside the point. The significance of these cases is that they show instances in which the same relief, derived from construction of a different body of law, has mooted the underlying controversy. *Cf. Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983) (a University's clearly articulated policy that it would ban an all-male honor society from campus until it discontinued its discriminatory membership policy—regardless of the outcome of the lawsuit before the Court—mooted the honor society's suit challenging the agency's determination that federal law and agency regulations required the University to ban the honor society from campus); *Douglas v. Donovan*, 704 F.2d 1276 (D.C. Cir. 1983) (agency appeal mooted by out-of-court settlement reached by private parties).

Now, back to the case at hand. Here, the FCC has concluded that its "present rules should be interpreted to *require customers* of Centrex-ETS service to pay FGA access charges for the termination of off-net calls, rather than local exchange rates and the special access surcharge." *Bell Atlantic Petition*, 2 F.C.C. Rcd. 7458, 7460 (1987) (emphasis added).[2] In arriving at that conclusion, the FCC reasoned as follows:

> [T]he Centrex-ETS service . . . should be treated like CCSA service for purposes of the access charge rules. It is clear that the BOCs are offering Centrex-ETS in direct competition with CCSA services and that the two services are very similar in terms of the functions they perform. Thus according different access charge treatment to the two services would raise serious competitive concerns.

Id. Through interpretation of its own regulations, therefore, the FCC concluded that local access charges must be the same regardless of whether a CCSA switch supplied by AT&T or a Centrex-ETN switch supplied by a BOC was employed.

With respect to local access charges, the FCC's interpretation worked the very result that AT&T sought from the District Court. Under the FCC's order, the BOCs came under the obligation to charge the same rate for local access, regardless of whether GSA purchased its switch from AT&T or a BOC. This relief differs not one whit from the District Court's order requiring U S West to "provide exchange access . . . for the Federal Telecommunications System (FTS) network and other private networks at the same rates, regardless of which carrier a customer selects to provide switching functions." J.A. at 27.

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[2] The FCC's decision was released December 18, 1987—after opening briefs of appellants and appellees in this case were required to be filed.

The District Court's order also requires "other local exchange facilities" to be priced identically. This, I assume, refers to the Dial 8 trunk lines, which my colleagues feature extensively and which I discuss below. To the extent that it is intended to govern other, unspecified situations, the order sweeps in matters that were not squarely presented to the District Court, and thus were unripe for judicial resolution. Indeed, the District Court has not heretofore been unmindful of these very concerns. As Judge Greene has wisely observed, the trial court is not to be in the business of issuing advisory opinions on the interpretations of various consent decree provisions:

> In the absence of an actual controversy and without the benefit of the Department [of Justice]'s position on many of these issues, the Court is unwilling to render an advisory opinion on these hypothetical and tangential matters.

United States v. Western Elec. Co., C.A. 82-0192, slip. op. at 7-8 (D.D.C. June 28, 1985), quoted in *Memorandum in Support of Motion for Clarification of Bell Atlantic's Obligations Under the Memorandum Opinion of November 26, 1986 and Request for a Stay* at 5 (Dec. 23, 1986); J.A. at 276. This is as it should be, for generalist courts are singularly ill-situated to regulate complex industries under the rubric of a solitary consent decree resolving a single (albeit important) lawsuit.

On this point, my colleagues and I are in happy accord. As the court today holds, "the trial court's Order does not extend beyond the questions presented by the provision of exchange access and Dial 8 lines to GSA at lower rates than those charged to AT&T." Maj. op. at 20. Thus, whether the relief afforded to AT&T is grounded in the consent decree or in the FCC's interpretation of its own regulations, the result is the same: GSA will be charged identical local access rates, regardless of which switch it elects to purchase. The dispute with respect to

local access rates, hotly contested in the District Court, is simply no longer a live controversy.

II

As Bell Atlantic itself concedes, the FCC's order does not address itself to the Dial 8 lines and therefore does not moot that controversy. *That issue, however, was not squarely resolved by the District Court's opinion and, as the case comes to us, is unripe for disposition.* AT&T's principal complaint before the trial court concerned the disparate access charges; at the same time, AT&T claimed that U S West's bid for Centrex-ETN switching services failed to cover the cost of Dial 8 trunks (or "intermachine" lines). *Memorandum in Support of AT&T's Emergency Motion to Compel U S West to Comply with Nondiscrimination Requirements of Decree* at 4, 6-7 (Nov. 6, 1986); J.A. at 39, 41-42. In response, U S West claimed that its bid to GSA did indeed cover these costs. *U S West Memorandum in Opposition to AT&T's Emergency Motion to Compel U S West to Comply with Nondiscrimination Provisions of Decree* ("U S West Opposition") at 17-18 (Nov. 18, 1986); J.A. at 196-97. The District Court never squarely resolved this issue; instead, the trial court's order required, generally, U S West to price "other local exchange facilities" at the same rates. *But there was no determination either that Dial 8 lines were in fact local exchange facilities (an issue contested by the parties on appeal) or that U S West's pricing had not been at the "same rate" in its bid to GSA.* Indeed, so minor was the role of Dial 8 lines in this drama that the District Court did not even refer to them *at all* in the course of its analysis. For all we can tell, the District Court simply did not focus on the issue (nor, in fairness, did it have occasion to).

In one sense, the disparity of treatment in the local access charges was *factually* an easy case. There was no *cost* difference for the BOC regardless of whether the

BOC or AT&T supplied the switch. A different price necessarily meant, as the trial court saw it, price discrimination, at least with respect to that element of service; the only real question was the legal one of whether such disparities were covered by the MFJ. Not so with Dial 8 lines. The cost to the BOC may be significantly different depending on whether AT&T or the BOC supplies the switch. *Thus, a price disparity in this setting does not necessarily mean a price discrimination.*[3] To so conclude would require factual findings, which as we have seen are entirely lacking in this case (again, through no fault of Judge Greene).[4]

Under these circumstances, "the appropriate course of action is to vacate the judgment and remand the case." *Rule v. International Ass'n of Bridge, Etc., Workers*, 568 F.2d 558, 568 (8th Cir. 1977). This is certainly the appropriate disposition here, where the entire focus of the case has been mooted by the FCC's order and the present record is inadequate to render judgment as to the Dial 8 lines.

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[3] Dial 8 lines are conceptually the same as "tails." As U S West originally argued in its opposition to AT&T's emergency motion, "AT&T would have the Court impute to U S West and its customers additional (and in fact duplicative) trunk costs which are in fact not real, a ploy that it successfully urged the FCC to reject when MCI made the same request regarding the 'tails' it has to pay for connection to an AT&T CCSA switch." U S West Opposition at 18; J.A. at 197.

U S West argued that although it had agreed to supply GSA the Dial 8 trunk lines at "no extra charge," that was only because it was cheaper to offer GSA Centrex and ETN services in two machines rather than one, and "the trunk costs between the machines are fully covered in the price GSA is paying." U S West Opposition at 18; J.A. at 197.

[4] The District Court held: 'The fact is that if identical service is provided by an interchange carrier and a Regional Company, the decree requires the application of the same access rates, regardless of differences in net work configurations." Slip op. at 5; J.A. at 23.

III

U S West claims that the case is not moot for two separate reasons. First, U S West argues that "[t]he Memorandum Opinion and Order is only a tentative interim decision pending completion of the rulemaking proceeding commenced at the same time; in contrast, the District Court's Orders would be effective indefinitely, and indeed they substantially preempt the outcome of the rulemaking proceeding." Reply Brief for U S West at 11-12. There is, admittedly, a grain of truth to this. But it is only a grain.

The FCC issued a Notice of Proposed Rulemaking, together with its order mandating equal access charges. But fairly read, the thrust of the NOPR is to invite comment on the "larger set of issues relating to the appropriate access charge treatment of private networks and private line users generally." 2 F.C.C. Rcd. 7458, [74]62 n.29 (1987). In particular, the FCC was concerned with the impact that its treatment of Centrex-ETS would have on PBX-ETS, a competitive system. Since "concerns about discrimination, efficiency, and enforcement" motivated the FCC to issue the NOPR in the first place, *see Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of Local Exchange*, 2 F.C.C. Rcd. 7441, 7442 (1987), it would appear highly unlikely that the FCC would overturn the basic thrust of its Dec. 18, 1987 order, which was to eliminate "unreasonable discrimination and undue preferences among rates for interstate services." *Bell Atlantic Petition, supra*, 2 F.C.C. Rcd. at 7458. But, even more basically, the FCC's order now appears final. By my reckoning, the time for appeal has expired, and none of the parties has informed us that judicial review has in fact been sought.

Second, U S West argues that "the District Court's Orders appear to impose requirements with respect to both exchange access charges and charges for facilities

used solely for intra-network purposes (the 'Dial 8' trunks); the FCC's Order deals only with the former, not at all with the latter subject. Because the FCC's Order is not coextensive with the District Court's Orders, it cannot moot them." Reply Brief for U S West at 12. But as explained above, the District Court made no specific findings with respect to the Dial 8 lines, and this aspect of the case is not ripe for review.

For its part, AT&T claims that the case is not moot for two reasons. Neither has merit. First, AT&T claims that the argument for mootness "rests on a single false premise: that the relief sought by AT&T's emergency motion was the construction of the FCC's access charge regulations that was issued on December 18, 1987." Supplemental Brief of AT&T at 4-5. AT&T claims that this was not its aim; if it were, AT&T would have gone to the Commission in the first instance rather than to court. Moreover, that relief is "[in]sufficient to prevent discrimination against AT&T in the future." *Id.* AT&T argues that "[n]othing in the FCC's Order prevents U S West from developing another switching service that is also functionally and competitively identical to AT&T's CCSA services . . . and again unilaterally exempting its switching service customers from the federal access charges that apply to the services of U S West's interexchange competitors." *Id.* at 6. But this mini-parade of horribles is, of course, like other such parades. It is mere speculation. It is manifestly a hypothetical situation that courts wisely refrain from addressing.

Second, AT&T contends that the case is not moot because "the District Court's decision is a holding that U S West violated the Decree in the past." AT&T maintains that because "[t]he question of the appropriate sanctions for U S West's past conduct is now pending, . . . the FCC's December 18th Order cannot moot this controversy." *Id.* at 7-8.

While we are indeed told that the Department of Justice is "considering" whether to seek sanctions, that issue will obviously be taken up in separate proceedings if and when the Department decides to seek them. The request lodged by AT&T seems to be dying on the vine; there is not the slightest indication that the Department is in fact going to act favorably on it. Transcript of Oral Argument at 72. And the mere possibility of such proceedings cannot create jurisdiction over an otherwise moot case.

In the meantime, contrary to AT&T's assertions, the District Court's opinion clearly does *not* reach any conclusions with respect to past violations of the consent decree. AT&T sought, and the District Court granted, *prospective relief* only in the form of a declaratory judgment.[5]

Finally, the court suggests that the mootness claim boils down to a contention that the FCC has primary jurisdiction in this case. Not so. Holding this case moot does not depend on a conclusion that the FCC has primary jurisdiction over local access rates. Indeed, the court's suggestion to the contrary highlights a basic error in its analysis. The court appears to reason that the mootness claim and primary jurisdiction argument amount to the same contention because the District Court and the FCC operated under different jurisdictional bases, and the potential remedies that each had to offer differed. The court's position thus appears to be that the FCC's action, taken in the course of construing its own statutory mandates, can *never* moot the District Court's orders. It matters not, in my colleagues' view, that the actual relief granted by the agency is the same as that given by the trial court. This reasoning goes further than simply rejecting the argument, advanced most vigorously

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[5] Notably, neither U S West nor AT&T challenges Bell Atlantic's argument with respect to the Dial 8 lines; both recognize that the heart of the matter is the local access charges.

by Ameritech, that the FCC has primary jurisdiction in matters in which the FCC and MFJ overlap. Indeed, this reasoning goes well beyond that, carrying it (apparently) to the position that the District Court has *exclusive* jurisdiction whenever the court and agency exercise their separate jurisdictions in overlapping areas of the MFJ and the Communications Act. Whatever the exact relationship between the District Court's rulings and the FCC's orders in cases of actual conflict, all that is needed to dispose of this case is to recognize that the District Court and the FCC have *concurrent* jurisdiction over local access rates.[6] This, the court, in effect, refuses to do.

IV

A final word. My colleagues' construction of the term "other persons" in Section II(B)(3) of the MFJ is deeply troublesome.[7] Specifically, the opinion construes "other persons" to encompass GSA. Maj. op. at 11. But this construction confronts head on the objection, advanced most vigorously by Pacific Telesis, that the MFJ's prohibitions against price discrimination were not intended to cover "private networks" such as GSA's. To-

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[6] If anything, considerations of comity argue quite the other way, namely in *favor* of exercising our discretionary power to hold this case moot (even if the FCC's actions had not already completely mooted this controversy). *See, e.g., Montgomery Environmental Coalition v. Costle*, 646 F.2d 568 (D.C. Cir. 1980) (dismissing petition for review of EPA decision on grounds of mootness and federal-state comity); *Chamber of Commerce of the United States v. United States Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980) (affirming dismissal of suit by district court on discretionary grounds of mootness: "In some circumstances, a controversy, not actually moot, is so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant.").

[7] Section II(B)(3) proscribes discrimination by a BOC "between AT&T . . . and other persons . . . in the interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service."

day's bold construction thus broadens significantly the possible reach of the term "other persons" and in so doing creates (seemingly) a far reaching requirement for broad price uniformity not mandated by the MFJ.

That the MFJ was not intended to cover local access by private network facilities is evidenced by the District Court's decision approving the MFJ, in which the court found "justified the parties' decision not to address" the demands of private networks for "equal access requirement[s]" that would apply to them. *United States v. AT&T*, 552 F. Supp. 181, 196 n.269 (D.D.C. 1982), *aff'd mem. sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983).

The court's response to these objections is unsatisfying. It addresses the argument as follows:

> [T]he trial court's discussion in this note [552 F. Supp. at 196 n.269] refers to the exchange access requirements of section II(A), which confers rights solely upon "all interexchange carriers and information service providers." The court does not refer to the nondiscrimination provision of section II(B), which forms one focus of the present controversy and which uses the broader term "other persons."

Maj. op. at 14. The opinion adds that "[i]n any event, this court is not bound by the District Court's earlier comments about the proper interpretation of some portion of the MFJ." Maj. op. at 15.

Although technically correct—the District Court refers to section II(A) only—it seems anomalous at best for the District Court to have rejected coverage under the MFJ for private carriers via section II(A), while at the same time intending private networks to gain the same rights through section II(B). Moreover, Appendix B, upon which the opinion also relies and which contains the language most favorable to AT&T's position, is only incorporated into the MFJ through section II(*A*), not section

II(*B*). The most natural reading of the MFJ is that private networks were not intended to be covered by the MFJ's antidiscrimination provisions *at all*.

The better interpretation would be to construe "other persons" to encompass the BOCs themselves. To be sure, this construction has its own problems. For example, if "other persons" is read to include the BOCs, section II (B) (2) would logically require the BOCs to treat AT&T no differently from themselves in the establishment and dissemination of technical information—an obvious anomaly.[8] In the final analysis, it seems the better course to admit that section II(B) does not, by its terms, support AT&T's position but that Appendix B, the underlying purposes motivating the decree, and its more recent "judicial gloss" all look the other way and point in AT&T's favor. Without expressing my own views as to the ultimate outcome on the merits of this case, this analysis of "other persons" at least has the advantage of not unnecessarily broadening the scope of the MFJ's coverage. In contrast, the court's opinion today appears to leave MFJ coverage broader and more uncertain than did Judge Greene's opinion, which was after all rendered under rather exigent circumstances.

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For the foregoing reasons, I respectfully dissent.

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[8] Section II(B)(2) requires that "[n]o BOC shall discriminate between AT&T . . . and other persons . . . in the . . . establishment and dissemination of technical information and procurement and interconnection standards."

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF
BELL ATLANTIC PETITION FOR DECLARATORY RULING
CONCERNING APPLICATION OF THE COMMISSION'S ACCESS
CHARGE RULES TO PRIVATE TELECOMMUNICATIONS
SYSTEMS

MEMORANDUM OPINION AND ORDER

Adopted: November 24, 1987;
Released: December 18, 1987

By the Commission

I. INTRODUCTION

1. On December 23, 1986, Bell Atlantic Telephone Companies (Bell Atlantic) filed a Petition for Declaratory Ruling concerning the application of this Commission's access charge rules to the Centrex-electronic tandem switching arrangement (Centrex-ETS)[1] employed

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[1] The service Bell Atlantic describes as Centrex-ETS differs from the conventional Centrex service that local exchange carriers (LECs) have offered their business customers for many years. The central office equipment used to provide the conventional Centrex service is an integral part of the local exchange switch. It consists of dial switching equipment located on the LEC's premises, which is interconnected with customer-provided stations on the customer's premises. This is used to provide intercommunication among the stations and station access via common lines to the exchange network. Centrex switches also route traffic onto interstate network. Centrex switches also route traffic onto interstate access lines, including those used for WATS and private line serv-

by Bell Atlantic in providing on-network switching for private telecommunications systems, such as the federal government's (GSA) Federal Telephone System (FTS) network, as well as off-network termination of interstate calls in the local exchange.[2] Specifically, Bell Atlantic requests that we clarify whether, under our Part 69 rules, it "may" require its customers to pay switched

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ices. More than a hundred station/system functions are available on conventional Centrex, including, *inter alia*, direct inward and outward dialing from Centrex stations, touch tone, three-way conference transfer, automatic callback calling, call waiting, call forwarding, call hold, and hunting. Centrex-ETS, when combined with conventional Centrex service, provides those switching functions as well as "toll-type" switching functions—that is, it can be used to interconnect interexchange trunks and switch traffic between those trunk that neither originates nor terminates in the exchange area where the Centrex-ETS switch is located. Centrex-ETS also provides a LATA-wide point of concentration for traffic to be directed to an interexchange carrier (IXC) and/or a Centrex-ETS private network. Furthermore, it offers certain private network management features, such as uniform numbering plans, automatic alternate routing (AAR), automatic route selection (ARS), and station message detail recording (SMDR).

[2] In this context, an on-network, or on-net, call describes a call made from one telephone or terminal on the private network to another telephone or terminal on that network. Since the call remains within the private network, the local exchange or end office switch is not used in completing the call.

An off-network, or off-net, originating call describes, a call made from a telephone or terminal that is not part of the private network to a telephone or terminal on the private network. An off-net terminating call describes a call made from a telephone or terminal on the private network to a telephone or terminal that is not part of that network. Thus, a local exchange or end office switch and a common line are used to complete off-net originating and terminating calls.

The FTS system, unlike some other networks, permits only off-net terminating—and not originating—calls from its private network. Thus, an off-net call in this context is a call made from an FTS telephone or terminal to a telephone or terminal that is not part of the FTS system.

access charges (in this case, Feature Group A (FGA))[3] for off-net calls that are completed through its Centrex-ETS switching service. For the reasons set out below, we conclude that our present rules should be interpreted to classify the Centrex-ETS service described in the Bell Atlantic pleadings as a CCSA-equivalent service for purposes of assessing access charges. That conclusion essentially provides the relief Bell Atlantic has requested.[4]

II. BACKGROUND

A. Prior Proceedings

2. The Bell Atlantic petition was prompted by a ruling of the AT&T disvestiture court[5] that the U S West Companies (U S West) were violating their nondiscrimination obligations under the Modified Final Judgment (MFJ)[6] in their provision of Centrex-ETS services for the FTS network. This ruling was issued in response to a motion filed by AT&T, in which it complained that U S West was applying FGA rates to off-net calls com-

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[3] The term "switched access charges" is used in this context to describe a combination of charges for the carrier common line and end office elements.

[4] We are also today adopting a Notice of Proposed Rule Making concerning the appropriate access charge treatment of interstate private networks and private line users that interconnect their facilities with the local exchange. Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange, CC Docket No. 87-530, FCC 87-363 (released Dec. 18, 1987) (hereinafter *Private Networks and Private Line Users NPRM*). In that Rule Making proceeding, we will consider, *inter alia*, whether traffic originating and terminating in the local exchange via Centrex-ETS service should continue to be subject to switched access charges.

[5] United States v. Western Electric Co., No. 82-0192, slip op. (D.D.C. Nov. 26, 1986) *(November 26 Memorandum)*.

[6] United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

pleted through the Common Controlled Switching Arrangement (CCSA) services[7] that AT&T provides for the FTS network, while U S West was charging GSA cheaper, flat, local business rates when it used Centrex-ETS services to complete off-net calls.[8] The two switching systems, AT&T argued, provide identical functions of separating on-net calls, which are routed by those switches over dedicated access lines that are part of the private network to customer locations within and outside the area, from off-net calls, which are routed into the local public, switched network.

3. In proceedings before the court on AT&T's motion, Bell Atlantic, along with several other regional Bell Operating Companies (RBOCs), claimed that the difference in charges was the result of this Commission's ac-

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[7] CCSA is a service offered by AT&T that was designed primarily for large customers with extensive communications needs in many different cities. It uses dedicated transmission lines and switches to create nationwide, private telecommunications networks. The CCSA switches not only connect private lines, but also interconnect those lines and networks with the telephone companies' local exchange and switch calls that originate or terminate over such local networks on and off CCSA private networks. Since the AT&T divestiture, and except for shared network facilities arrangements (SNFA), CCSA switches have been located at AT&T's facilities (its "point of presence" or "POP") and perform at most only incidental local and intrastate switching. Prior to divestiture, and in SNFA situations now, the CCSA switch was, and is, on occasion a leased portion of the LEC's central office switch. AT&T reports all off-net traffic terminating in the local exchange via its CCSA switch as interstate for access charge purposes. AT&T's Enhanced Private Switched Communications Service (EPSCS) is an equivalent, albeit more sophisticated and newer, private network switching service. EPSCS offers improved transmission quality for voice and data and additional user control, accounting, and administrative features.

[8] A special access surcharge for each interstate private line terminating in the Centrex-ETS is also required by the Commission's access charge rules, unless one of the exemptions provided in Section 69.115(e) of the rules applies. *See* n.17, *infra*.

cess charge rules, which, they argued, apply switched access charges to off-net traffic switched via CCSA, but not to similar traffic switched via a private branch exchange (PBX) or Centrex arrangement. In the latter situation, the RBOCs asserted, our rules apply the $25 per line special access surcharge to the interstate private lines terminating in the PBX or Centrex switch in lieu of switched access charges.[9]

4. The court granted AT&T's motion, ruling that the switching services being offered by U S West and AT&T were identical and that the MFJ requires the BOCs to provide exchange access to GSA at the same rates regardless of whether GSA selects a BOC or an IXC to provide the switching services. The court further stated that if a conflict between the MFJ and Commission rules and orders existed, "the Regional Companies must seek to resolve the conflict in favor of the decree." Therefore, it directed U S West, "at a minimum," to seek interpretation and, if necessary, amendment of any access charge rules that are inconsistent with its interpretation of the MFJ.[10] Subsequently, Bell Atlantic filed this petition requesting that we clarify whether, under the Part 69 rules, it "may require its customers to pay Feature Group A charges for off-network calls which are completed through Centrex/Electronic Tandem Node." If the rules do not permit this result, Bell Atlantic asks us

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[9] *See, e.g.*, Bell Atlantic's Response to AT&T's Emergency Motion to Compel U S West to Comply with the Nondiscrimination Provisions of the Decree, filed Nov. 18, 1986, at 8-10; U S West Memorandum Opposition to AT&T's Emergency Motion to Compel U S West to Comply with Nondiscrimination Provisions of Decree, filed Nov. 18, 1986, at 24; Opposition of Pacific Telesis Group to AT&T's "Emergency Motion" Against U S West, filed Nov. 18, 1986, at 15-16; Ameritech's Response to AT&T's Emergency Motion to Compel U S West to Comply with the Nondiscrimination Requirements of the Decree, filed Nov. 18, 1986, at 1-2, 8-17.

[10] *November 26 Memorandum* at 8.

whether we are "willing to modify those rules in light of the court's November 26 opinion." [11]

B. Commission Access Charge Orders and Rules Regarding CCSA and Centrex Service

5. In a series of orders in CC Docket No. 78-72, we have adopted a comprehensive access charge plan for the recovery by LECs of the costs associated with the origination and termination of interstate telecommunications services.[12] The goals of our access charge plan include the elimination of unreasonable discrimination and undue preferences among rates for interstate services.[13] We concluded in the *Access Charge Order* that existing combinations of interstate service rates produced unreasonable discrimination and undue preferences that were caused in part by the divergent methods used to

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[11] Bell Atlantic Petition at 4. In response to a motion for clarification and request for a stay filed by Bell Atlantic, the court stated that its November 26 ruling was "not fact-specific" (that is, not dependent on the particular configuration used by U S West to provide its Centrex-ETS service), and that the legal principles set forth in its *November 26 Memorandum* applied to all the BOCs, not just to U S West. Memorandum and Opinion, United States v. Western Electric Co., No. 82-0192, slip op. (D.D.C. Mar. 31, 1987).

[12] Third Report and Order, MTS and WATS Market Structure. CC Docket No. 78-72, 93 FCC 2d 241 (1983) (hereinatfter *Access Charge Order*), *modified on reconsideration,* 97 FCC 2d 682 (1983) (hereinafter *First Reconsideration Order*), *modified on further reconsideration,* 97 FCC 2d 834 (1984) (hereinafter *Second Reconsideration Order*), *aff'd in principal part and remanded in part,* National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied,* 105 S. Ct. 1224, 1225 (1985), *modified on further reconsideration,* 99 FCC 2d 708 (1984), 101 FCC 2d 1222 (1985), *aff'd on further reconsideration,* 102 FCC 2d 849 (1985), *petitions for review pending,* People of California v. FCC, No. 84-1124 (D.C. Cir., petition filed April 2, 1984), and AT&T v. FCC, No. 84-1148 (D.C. Cir., petition filed April 16, 1984).

[13] *See, e.g., Second Reconsideration Order,* 97 FCC 2d at 834-35, para. 1.

compensate LECs for the use of common lines and end office switching faciliites. We adopted rules for the computation and assessment of charges for carrier common line and end office access elements (switched access charges) that were designed to alleviate those disparities. We required that these charges be assessed for some access services, such as open end access for Foreign Exchange (FX) and off-net access for CCSA, that had previously been billed as local exchange service. The *Second Reconsideration Order* said that FX-CCSA Open End access "includes access for variations of CCSA service that are not described as CCSA in carrier tariffs." [14] Those variations are sometimes described as "CCSA-equivalent" services. None of the access charge orders lists the CCSA-equivalent services or describes the essential characteristics of a CCSA-equivalent service.

6. The original rules that were adopted in the *Access Charge Order* did not apply access charges to every form of interstate access that uses an end office switch. For example, that order did not require LECs to assess charges for "leaky PBX" usage.[15] Such traffic, carried over private lines to a PBX or equivalent device and then patched through that switch into the local exchange, uses the same local exchange facilities as do local calls originating from that PBX. The LEC, in that case, may be unable to distinguish the interstate "leaked" calls from those originating locally.[16] We refrained from assessing access charges for leaky PBX usage because it would be difficult to do so and because we believed our subscriber line charge plan would quickly eliminate

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[14] *Id.* at 864 n.45, para. 97.

[15] *Access Charge Order*, 93 FCC 2d at 279-280, para. 127. The "leaky PBX" problem was first described in MTS and WATS Market Structure, Second Supplemental Notice of Inquiry and Proposed Rule Making, 77 FCC 2d 224, 241, para. 63 (1980) (hereinafter *Second Supplemental Notice*).

[16] *Second Supplemental Notice*, 77 FCC 2d at 241, para. 63.

the incentive to use leaky PBX connections as a substitute for other interstate services. When we adopted a revised subscriber line charge in the *First Reconsideration Order*, we decided that the leaky PBX problem was likely to continue for a long time. Therefore, we created an additional charge that is assessed on some special access services as a surrogate for some of the access charges assessed upon other interstate services that use the same local facilities. As an interim measure until measurement of the interstate traffic became practical, we imposed a $25 per line special access surcharge on all jurisdictionally interstate private lines, not falling within specific exceptions, that terminate in a PBX or other device that can interconnect those lines with subscriber lines that access the local exchange switch. The *Second Reconsideration Order* clarified that Centrex may be a PBX equivalent device for purposes of assessing the special access surcharge. That order said:

> We shall require that a surcharge be imposed whenever jurisdictionally interstate private line and a local exchange service subscriber line are attached to a device that can interconnect the private line with local exchange service regardless of whether the "leakage" capability exists in customer premises equipment or in a Centrex-CO switch.[17]

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[17] *Second Reconsideration Order*, 97 FCC 2d at 874 n.57, para. 125. In the *First Reconsideration Order*, we adopted five exemptions to the surcharge for those lines that cannot practically be used to access the local exchange network or otherwise be used to avoid interstate access charges. 97 FCC 2d at 715-18, paras. 83-86. In the *Second Reconsideration Order*, we added a sixth exemption that allows customers to be exempt from the surcharge if they certify to their exchange carriers that their private lines do not terminate in a PBX or other device capable of leaking interstate traffic into the local exchange. 97 FCC 2d at 874-75, para. 128; see § 69.115 (e)(6). We subsequently clarified that this last exception applies when a subscriber certifies that its PBX or similar equipment has been rendered incapable of interconnection with the local exchange due to either hardware or software restriction. See Clarification of

III. COMMENTS AND REPLY COMMENTS

7. Eleven parties filed comments and reply comments on the Bell Atlantic petition.[18] Two of the RBOCs, the Pacific Companies and Southwestern Bell, contend that the access charge rules do not require application of switched access charges to off-net interstate calls terminated in the local exchange by a Centrex-ETS, but, instead, allow the LECs and their customers to choose either FGA rates [19] or local exchange rates and the special access surcharge.

8. The remaining commenters, including Ameritech, interpret the access charge rules to require application of FGA rates to a Centrex-ETS arrangement if it terminates off-net traffic using functionally identical off-net access line facilities (ONALs) as those used by AT&T's CCSA. In that case, these commenters conclude, the Centrex-ETS is a CCSA-equivalent. Ameritech notes, however, that not all Centrex-ETS switches are configured that way. Yet, even when configured differently, Ameritech acknowledges, at least some of these Centrex-ETS switches are technically capable of identifying and measuring the terminating off-net exchange access traf-

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Sections 69.5 and 69.115, Memorandum Opinion and Order, 57 RR 2d 1630 (1985) (ARINC Clarification Order), aff'd on reconsideration, 59 RR 2d 107 (1985), appeal docketed.

[18] The following parties filed Comments: Ad Hoc Telecommunications Users Committee (Ad Hoc Committee); AT&T; MCI Telecommunications Corporation (MCI); Pacific Bell and Nevada Bell (Pacific Companies); Telecommunications Committee of the American Petroleum Institute (API); and Utilities Telecommunications Council (UTC). The following parties filed Reply Comments: Ad Hoc Committee; Aeronautical Radio, Inc. (ARINC); Ameritech Operating Companies (Ameritech); Bell Atlantic; Department of Justice (DOJ); MCI; NYNEX Telephone Companies (NYNEX); the Pacific Companies; and Southwestern Bell Telephone Company (Southwestern Bell).

[19] The charges for FX-CCSA Open End access and certain other line side connections are sometimes called FGA rates.

fic. Ameritech commits to reconfiguring its Centrex-ETS switches to separate and measure off-net traffic whenever it is possible to do so, and to charge FGA rates in such cases. In the case of switches that can be used to provide Centrex-ETS service, but cannot, as a practical matter, be retrofitted, Ameritech urges us to permit the use of the special access surcharge as the appropriate way to recoup interstate carrier common line costs from exchange traffic terminated through those particular Centrex-ETS arrangements.

9. DOJ filed Reply Comments supporting the Bell Atlantic petition insofar as it asks us to permit the LECs to charge their Centrex-ETS customers the same rates for off-net exchange access as they charge AT&T for off-net exchange access via CCSA.[20] DOJ contends that because the services compete with each other, equalizing the charges will end price discrimination prohibited by the MFJ and the Communications Act. It asserts that such a course will also eliminate possible claims of conflict between this Commission's rules and the MFJ nondiscrimination provisions, and will promote effective competition in the provision of important telecommunications services to the federal government and other large users.

10. Moreover, DOJ argues that equal rates are required under this Commission's access charge rules for CCSA and Centrex-ETS services because they are functionally equivalent in the manner in which they route off-net calls from remote private network locations into the local exchange network. The Commission's rules, it argues, provide for services that are equivalent to CCSA to be subject to the same access charge treatment as CCSA. DOJ concludes that since Centrex-ETS services

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[20] DOJ takes no position on whether the appropriate charge under this Commission's access charge rules is FGA or local exchange rates plus the special access surcharge. It simply contends that customers of both services must be required to pay the same rates.

are functionally identical to CCSA, they must be CCSA-equivalent and, thus CCSA and Centrex-ETS should be subject to the same rates.

11. MCI goes further than the other commenters, arguing that Centrex switches—ETS or conventional—should not be considered "leaky PBXs" for purposes of this Commission's access charge rules, and the special access surcharge simply should not apply to them. The surcharge, MCI notes, which represents a rough approximation of the amount of interstate usage of exchange access, was adopted to provide some measure of recovery for LECs for interstate traffic terminating or originating in the local exchange that cannot accurately be identified or measured by the LEC. Those difficulties do not exist in LEC-provided Centrex services, MCI claims. Centrex services enable customers to originate and terminate communications using LEC-operated central office equipment. With that service, MCI claims, the Centrex provider can directly measure the jurisdictional nature of each call made and its duration. Thus, as with AT&T's CCSA service, switched access charges can correctly be applied and there is no reason to rely on a less exact measure, such as that represented by the surrogate special access surcharge.

12. NYNEX urges us to refrain from addressing the issue raised by MCI, which, it asserts, is much broader than the issue raised by the Bell Atlantic petition. According to NYNEX, the question whether FGA rates must be applied to all Centrex switches—conventional as well as ETS—and to all leaky PBXs that are capable of identifying and measuring interstate calls "leaked" into the local exchange was decided in the negative by this Commission in our access charge orders, and nothing in the court's *November 26 Memorandum* or Bell Atlantic's petition compels a reexamination of the matter.[21] Bell

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[21] Accord Comments of UTC and API.

Atlantic similarly urges us not to reach this question. In addition, it disputes the notion that "any Centrex switch can 'directly measure the jurisdictional nature'" of all calls that it completes, and notes that when a call is completed through a private line connected to a Centrex, the Centrex system has no way of determining where the call originated.

IV. DISCUSSION

13. Our access charge orders and rules clearly provide for application of switched access charges to interstate off-net traffic switched into the local exchange via CCSA and CCSA-equivalent services.[22] Indeed, an essential purpose of CC Docket No. 78-72 was to eliminate the discrimination between interstate FX and CCSA customers and interstate MTS/WATS and MTS/WATS-equivalent customers in the charges applied for use of local exchange facilities. Thus, the access charge orders subject the open end of FX lines and CCSA ONALs and their equivalents, along with MTS/WATS and these equivalents, to these switched access charges.[23]

14. Our rules and orders prescribe different treatment for interstate traffic "leaked" into the local exchange via a PBX or equivalent switch.[24] Since interstate calls carried over private lines and patched through a PBX into the local exchange use the same local exchange subscriber lines as do local calls that are placed over the switched network, we concluded that the LEC was unable to distinguish the interstate leaked calls from local calls. With no way of measuring the frequency and duration of those "leaked" interstate calls, the LEC was unable to assess those PBX users switched access charges to contribute to the costs of the local exchange switches

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[22] See n.14, supra.

[23] See para. 5, supra.

[24] See n.15, supra.

and common lines they used in attaining local access. As an interim step, we adopted a special access surcharge of $25 per line to be paid by all jurisdictionally interstate private lines that do not fall within specifically enumerated exceptions.[25] Moreover, our orders specify that the special access surcharge applies not only to private lines that terminate in a PBX, but also to private lines that terminate in any device that can interconnect those lines with the local exchange service, including Centrex equipment.[26]

15. Thus, our access charge orders and rules create a dichotomy between CCSA and equivalent services, which are subject to the FGA switched access charges, and PBX and equivalent services, including Centrex, which are subject to the special access surcharge. Those orders and rules, however, do not define CCSA-equivalent service and do not mention Centrex-ETS.[27]

16. Bell Atlantic's petition thus raises for the first time the question of the appropriate access charge treatment for interstate traffic switched into the local exchange via Centrex-ETS service. As noted above, the Centrex-ETS service at issue in the Bell Atlantic petition and the underlying U S West case performs many of the same functions as does AT&T's CCSA private network switching service. Thus, Centrex-ETS and CCSA each separate on-net calls, which are routed by those

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[25] See para. 6, supra.

[26] Id. and n.17.

[27] It appears that while the BOCs were providing Centrex-ETS switching services in 1982, for the most part the private networks using these services were smaller in size and geographic coverage than the private networks connected by CCSA switches. Thus, Centrex-ETS service was provided under the BOCs' local exchange Centrex tariffs. The BOCs apparently were not using Centrex-ETS, at least on any wide-scale basis, to offer switching services to nationwide private networks, such as the FTS network, in direct competition with AT&T's CCSA and EPSCS services, as they presently are doing.

switches over dedicated access lines to customer locations in and outside of the area, from off-net calls, which are routed into the public switched network. In addition, CCSA and Centrex-ETS services directly compete with one another. Thus, recently GSA chose U S West's Centrex-ETS switches to replace AT&T's CCSA switches in four locations in U S West's region, and it appears that other RBOCs intend to compete with AT&T to replace additional CCSA switches in other locations on the FTS network.[28] On the other hand, and in contrast to CCSA, Centrex-ETS also provides the conventional Centrex features, such as local switching, and frequently is combined with conventional Centrex service in a single switch.

17. Thus, Centrex-ETS appears to be a "hybrid" service, combining elements of both CCSA-equivalent and PBX-like switching services. Based on the record before us, however, we are persuaded that the Centrex-ETS service described in the pleadings should be treated like CCSA service for purposes of the access charge rules. It is clear that the BOCs are offering Centrex-ETS in direct competition with CCSA services and that the two services are very similar in terms of the functions they perform. Thus, according different access charge treatment to the two services would raise serious competitive concerns. Furthermore, there do not appear to be substantial problems with identifying and measuring off-net traffic switched through a Centrex-ETS. We also note that no party to this proceeding argues that our rules prohibit the application of the FGA access charges to this hybrid service. The most that is asserted, by two Regional Bell Operating Companies (RBOCs) is that they and their customers may select which access charge treatment they prefer. Other commenters, including

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[28] See, e.g., Memorandum in Support of Motion for Clarification of Bell Atlantic's Obligations Under the Memorandum Opinion of November 26, 1986 and Request for a Stay, filed Dec. 23, 1986, at 2-3.

other RBOCs, IXCs, and users, argue for equivalent access charge treatment for CCSA and Centrex-ETS.

18. In view of our analysis of Centrex-ETS and the Part 69 rules, we conclude that our present rules should be interpreted to require customers of Centrex-ETS service to pay FGA access charges for the termination of off-net calls, rather than local exchange rates and the special access surcharge.[29]

V. ORDERING CLAUSES

19. ACCORDINGLY, IT IS ORDERED, That, pursuant to Sections 4(i), 4(j), 5(c), 201-205, 218, 229, 403, and 404 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 155(a), 201-05, 218, 220, 401, and 404, and Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, the Petition for Declaratory Ruling of the Bell Atlantic Telephone Companies IS GRANTED TO THE EXTENT INDICATED HEREIN, and is otherwise denied.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

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[29] We recognize, however, that providing different access charge treatment for Centrex-ETS and conventional Centrex service raises concerns about discrimination, efficiency, and enforcement. Thus, because the record before us is limited, and because the access charge issues relating to Centrex-ETS are part of a larger set of issues relating to the appropriate access charge treatment of private networks and private line users generally, we are today initiating a Rule Making to consider these issues. The Rule Making specifically consider whether switched access charges should continue to apply to Centrex-ETS, and, if so, as suggested by MCI in its Comments, whether such charges should also apply to conventional Centrex service if the interstate traffic switched into and out of the local exchange from a conventional Centrex is identifiable and measurable. See Private Networks and Private Line Users NPRM, CC Docket No. 87-530, FCC 87-363.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0192

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
Defendants.

[Filed Mar. 31, 1987]

MEMORANDUM AND ORDER

Bell Atlantic has moved for an order clarifying the Court's Memorandum and Order of November 26, 1986, which granted AT&T's motion for relief against U S West, Inc. Specifically, Bell Atlantic seeks clarification of the question whether the November 26 Memorandum binds that company and, if so, whether the application of the November 26 Memorandum is limited to "the issue of pricing for access for interLATA traffic on private networks where competition exists between the BOCs and interexchange carriers for associated switching services." Motion of Bell Atlantic for Clarification of its Obligations Under the Memorandum Opinion of November 26, 1986 at 1. Bell Atlantic also seeks a stay as to further application of the November 26 Memorandum to services it currently provides so that it may

apply to the FCC for direction as to how its access tariffs may be changed in light of the Court's decision.

The legal principles set forth in the November 26 Memorandum are clear. Those principles are not fact-specific, and there is therefore no basis for distinguishing between U S West and Bell Atlantic. Since there is no need to clarify the scope of the Memorandum, the Court will deny Bell Atlantic's motion for clarification.

Bell Atlantic's argument for a stay likewise lacks merit. For the reasons set forth in the November 26 Memorandum, failure to grant a stay would not cause a "collision" between the decree and the federal or state regulators. *See* November 26 Memorandum at 6-8. Certainly, a party before the Court cannot condition compliance with judicial orders upon contingencies relating to actions that may be requested of regulatory bodies. Moreover, a stay is unnecessary in any event because Bell Atlantic's motion indicates that it is able presently to comply with the decree regardless of the outcome of any future FCC or state proceedings. Bell Atlantic states that it will "immediately begin submitting bids that are consistent with the Court's Memorandum [of November 26, 1986] for future service." Motion of Bell Atlantic for Clarification of its Obligations Under the Memorandum Opinion of November 26, 1986 at 1. It appears, then, that Bell Atlantic is in a position in which the interplay of its state and federal tariffs permits private network access facilities to be provided at identical rates.

For the reasons stated above, it is this 30th day of March, 1987

ORDERED that Bell Atlantic's motion for clarification be and it is hereby denied; and it is further

ORDERED that Bell Atlantic's request for a stay pending its application to the Federal Communications

Commission for direction as to how its access tariffs may be changed in light of the Court's Memorandum and Order of November 26, 1986 be and it is hereby denied.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0192

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, *et al.*,
Defendants.

[Filed Nov. 26, 1986]

MEMORANDUM

On November 6, 1986, AT&T filed an emergency motion seeking to compel U S West to comply with the nondiscrimination provisions of the decree. *United States* v. *Western Electric Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). AT&T specifically alleges that U S West has violated and is about to violate again section II(B) and Appendix B, Section B of the decree by offering to provide essential local access facilities at lower rates to the government's General Services Administration (GSA) upon the condition that GSA use a U S West switching service rather than a comparable service provided by AT&T or other interexchange carriers. AT&T asks the Court to order U S West "(1) to provide access and other local exchange facilities to GSA at the same rates, regardless of which carrier GSA selects to provide

switching services, and (2) publicly to announce what these rates will be at least 15 days before the final date for the submission of any bids to GSA." Comments on AT&T's motion have been filed by the Department of Justice, five Regional Holding Companies (NYNEX, Pacific Telesis, Ameritech, Bell Atlantic, and U S West) and MCI.[1]

I

Over the past year, U S West has been replacing AT&T as the provider of interexchange switching services necessary for operation of the government's FTS network in four cities in the Mountain Bell territory. AT&T has repeatedly claimed that U S West achieved this result by engaging in unlawful discrimination in the provision of access services, and it continues to make that assertion in the current motion. More specifically, the claim is that U S West advised GSA that it could obtain lower rates for access to the local network if it purchased the necessary switching services from U S West, but that the rates would be higher if it obtained the same switching services from AT&T or another carrier. According to AT&T, U S West also offered to provide GSA with certain dedicated trunk groups at no cost, while requiring AT&T to pay access charges for such facilities should it be the carrier providing FTS switching services to GSA.

The Department of Justice instituted an investigation to determine whether a violation of the decree had occurred, but it has not to date submitted a formal recommendation for sanctions. However, on the basis of the information secured in that investigation, the Department supports AT&T's present emergency[2] motion.

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[1] The Department of Justice and MCI support the AT&T position; the Regional Companies support U S West.

[2] GSA published a request for proposals for the replacement of 14 additional FTS switches currently provided by AT&T on Octo-

II

U S West's obligation under the decree not to discriminate in the pricing of exchange access and exchange service on the basis of a customer's choice of switching service provider is crystal clear. Section II(B) of the decree prohibits any Regional Company[3] from discriminating "between AT&T . . . and other persons . . . in the . . . interconnection and use of the BOC's telecommunications services and facilities or in the charges for each element of service." Further, Appendix B (section B.1) of the decree requires that the Regional Companies file exchange access tariffs that "shall not discriminate against any carrier or other customer." Finally, an order issued by this Court last year determined that the decree imposes an obligation on the Regional Companies to offer to customers access facilities at the same rates regardless of whether the customer obtains switching services from such a company or from another source. *United States* v. *Western Electric Co.*, C.A. No. 82-0192, Memorandum Order (June 28, 1985) (PNB Order).[4]

In short, the plain language of section II(B), Appendix B, section B of the decree, and the PNB order, all

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ber 29, 1986, and bids for these switches are due by December 15, 1986. Concerned that it would be handicapped by U S West's pricing policies in bidding for the additional FTS switch replacements, AT&T filed this motion on November 6, 1986, requesting that the Court determine in advance of the December 15 date whether U S West's pricing violates the decree.

[3] As this Court has held many times, and as the Court of Appeals reaffirmed in its recent opinion, the decree's requirements with respect to the Bell Operating Companies apply equally to the Regional Holding Companies. *See United States* v. *Western Electric Co.*, 797 F.2d 1082 (D.C. Cir. 1986).

[4] The Court held in regard to that controversy that Pacific Northwest Bell (PNB) had not violated the decree in connection with services provided to the State of Oregon because PNB's rates to the customer for the services were not dependent upon which company—PNB or an interexchange carrier—provided the switching service.

condemn on their face as illegal under the decree discriminatory pricing schemes such as that adopted here by U S West.[5]

III

U S West asserts that its pricing disparity is permissible notwithstanding the decree because different access charges for Centrex (offered by U S West) and CCSA (offered by AT&T) services are incorporated into U S West's federal and state tariffs. That being so, it is said, enforcement of the nondiscrimination provisions in

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[5] Contrary to the assertion made in some of the Regional Company memoranda, the decree was not intended to prevent only discrimination in favor of AT&T or among interexchange carriers, while permitting discrimination against AT&T. This assertion was rejected several years ago, *see United States* v. *Western Electric Co.*, 583 F. Supp. 1257, 1259, 1259 n.10 (D.D.C. 1984), and it is entirely inconsistent with the basic scheme of the decree that the competitive telecommunications markets were to operate on the basis of level playing fields.

Similarly without merit is the U S West contention that no discrimination exists here because when charges for services other than off-network access are taken into account, the total price to the customer favors the AT&T service. While the accuracy of this contention cannot be determined from the figures provided by the parties, it is irrelevant in any event. The decree's nondiscrimination provisions do not focus on the question what overall "packages" the several competitors are able to offer but on the issue whether each element of exchange access provided by a Regional Company is priced equally regardless of who supplies the other elements.

This principle also disposes of the argument of several other Regional Companies that the pricing disparity is due to AT&T's particular off-network access configuration rather than to any disparity in exchange tariffs. The fact is that if identical service is provided by an interexchange carrier and a Regional Company, the decree requires the application of the same access rates, regardless of differences in network configurations. As the PNB order indicated some time ago, the decree's nondiscrimination provisions require the Regional Companies to provide access to private network switching services at equivalent rates, regardless of the particular network configuration chosen by the customer.

this instance "would place the [decree] in direct conflict with federal and state regulatory authorities and would require a dramatic reconfiguration of tariff structures and rate levels at both the federal and state level." [6]

This argument is so lacking in merit as to be frivolous. In the first place, there is no indication of a conflict between the decree and federal or local tariffs. To the contrary, the requirement that U S West comply with the nondiscrimination provisions of the decree actually complements regulatory guidelines. Thus, for example, section 202(a) of the Federal Communications Act, 47 U.S.C. § 151 *et seq.*, prohibits discrimination by carriers subject to the FCC's jurisdiction, and most state regulatory statutes contain similar nondiscrimination provisions.

More basically, the U S West contention parallels the argument the Bell System consistently but always unsuccessfully advanced in the governmental and private suits brought against it in the 1970s and early 1980s—that its activities were insulated from the antitrust laws because these activities were required, or permitted, under federal or state tariffs approved, or not disapproved, by the Federal Communications Commission or state regulatory bodies. *See, e.g., Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, 487 F. Supp. 942, 946 (S.D.N.Y. 1980); *Southern Pacific Communications* v. *American Tel. & Tel. Co.*, 740 F.2d 980, 999-1000 (D.C. Cir. 1984); [7] *Jarvis*,

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[6] U S West Response at 24.

[7] As the Court of Appeals there stated:

> [T]he initial decision to file a tariff establishing rates or to provide interconnections to a competing specialized common carrier rests with AT&T, and AT&T's tariffs and interconnection decisions often become effective without FCC scrutiny or approval. At minimum, long regulatory delays often have preceded final FCC approval or disapproval of AT&T's allegedly predatory rates, refusals to interconnect, or unreasonable and discriminatory terms and conditions of access to local dis-

Inc. v. *American Tel. & Tel. Co.*, 481 F. Supp. 120, 123 (D.D.C. 1978); *see also, Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372 (1973). If that line of argument did not meet with success in the context of suits brought to enforce the generality of the antitrust laws, *a fortiori* it cannot prevail when advanced to defeat rights and duties established by a judicial decree entered pursuant to those laws. To state it another way: when it is charged with violations of an antitrust decree, U S West can no more hide behind the tariffs it is filing with federal or local regulators than the Bell System could hide behind such tariffs when charged with violations of the antitrust laws.

In providing exchange service and exchange access, the Regional Companies may, of course, be subject in some particulars both to the decree and to orders issued by federal or state ratemaking authorities. If such a conflict exists—and, as noted *supra*, that is by no means certain—the Regional Companies must seek to resolve that conflict in favor of the decree. *See generally Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958). Thus, U S West must, at a minimum, apply to the regulatory authorities to interpret and, if necessary, to amend or waive their rules so as to permit compliance with the decree—something U S West has conspicuously not done.[8]

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tribution facilities. As Judge Greene concluded in *United States v. AT&T*, "it would be a gross misconception of the realities to equate the instant statutory scheme, the relatively weak regulatory controls which have implemented that scheme, and defendants' alleged activities which offend both the antitrust laws and the regulatory purposes, with the kind of explicit regulation endorsing industry conduct which the Supreme Court has held in relatively few instances to be inconsistent with antitrust enforcement." 461 F. Supp. at 1328.

740 F.2d at 1000 (footnotes omitted).

[8] If such application is made and proves to be unsuccessful, there would still be time and opportunity to request further guidance from the Court.

It is clear that AT&T is being discriminated against in violation of the decree, and that it is entitled to the relief it seeks. An appropriate order is being issued contemporaneously herewith.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

November 26, 1986

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0192

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, *et al.*,
Defendants.

[Filed Nov. 26, 1986]

ORDER

Upon consideration of AT&T's emergency motion to compel U S West to comply with the nondiscrimination requirements of decree, the memoranda filed in support of and in opposition to the motion, and the entire record herein, it is this 26th day of November, 1986

ORDERED that U S West, Inc., and its affiliates shall forthwith (1) provide exchange access and other local exchange facilities for the Federal Telecommunications System (FTS) network and other private networks at the same rates, regardless of which carrier a customer selects to provide switching functions, and (2) publicly to announce the access and other local charges that will be the basis for any U S West responses to the Ceneral Services Administration's pending request for proposals to replace switching systems on the FTS network at least 15 days prior to the submission of those responses.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

No. 88-189

In the Supreme Court of the United States

OCTOBER TERM, 1988

BELL ATLANTIC, PETITIONER

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case involves interpretation of the decree in the government's antitrust case against American Telephone and Telegraph Company (AT&T). The district court held that the nondiscrimination provisions of that decree prohibit the divested Bell Operating Companies (BOCs) from charging customers more for access to their local telephone exchanges if they use AT&T's switching services than if they use competing BOC services. The district court entered an order requiring U S West to cease such discrimination. Petitioner requested a declaratory ruling from the Federal Communications Commission (FCC) that its regulations permit equalization of access charges for certain competing switching services. The FCC issued a declaratory ruling in which it tentatively concluded that its regulations not only permit but also require that the

access charges for those competing services be equalized, although the Commission stated that it intends to revisit the issue in the context of a broader rulemaking. Petitioner contends that the existence of the FCC's declaratory ruling required the court of appeals to vacate as moot the district court's order enforcing the antitrust decree.

1. a. The Modification of Final Judgment (MFJ) in the AT&T antitrust case required respondent AT&T to divest itself of the BOCs, which were thereafter to provide local telephone exchange services and exchange access. *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 226-228 (D.D.C. 1982), aff'd mem. *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).[1] Pursuant to the MFJ, AT&T transferred the BOCs to seven regional holding companies, including U S West and petitioner Bell Atlantic. Part II.B.3 of the MFJ prohibits any BOC from discriminating between AT&T and "other persons" in the "interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service" (552 F. Supp. at 227), and Appendix B, Section B.1, requires each BOC to establish "unbundled tariffs" for exchange access that "shall not discriminate against any carrier or other customer" (*id.* at 233).

The General Services Administration (GSA) operates the Federal Telecommunications System (FTS), a private telephone network for the government's civilian agencies. Many calls on the network are from one network telephone to another (on-net calls), but others are placed to nonnetwork telephones (off-net calls). Off-net calls must be switched into the public exchange network before reaching their final destination. In some places GSA has

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[1] The MFJ defined "exchange access" as "the provision of exchange services for the purpose of originating or terminating interexchange telecommunications" (552 F. Supp. at 228).

purchased that switching service from the local exchange carriers, such as U S West, which perform the service with an ETS (Electronic Tandem Switch) in conjunction with their local Centrex switching service. In other places GSA has secured the service from AT&T, an interexchange carrier, which uses a CCSA (Common Control Switching Arrangement) to switch calls into the local exchange.

Under FCC regulations, the BOCs impose an "access charge" for connecting interexchange calls to the local exchange. See 47 C.F.R. Pt. 69 (1987). In bidding against AT&T to provide off-net switching services to GSA in local exchange areas served by U S West, U S West took the position that, if AT&T provided the switching service, U S West would charge the usage-based "carrier's carrier" access charge established by 47 C.F.R. 69.5(b) (1987) and charge AT&T separately for so-called "Dial 8" lines (lines connecting the local FTS telephones to the interexchange system). On the other hand, U S West maintained, if it provided the switching service itself, it would charge GSA only the business line rate plus the flat per-line "special access" surcharge established by 47 C.F.R. 69.5(c) (1987), and U S West would include the cost of the Dial 8 lines as part of a single charge to GSA for its Centrex service (1 C.A. App. A38-A42, A194, A196-A197).

AT&T filed an "Emergency Motion to Compel U S West to Comply With Nondiscrimination Provisions of Decree," alleging that "U S West is offering to provide essential local access facilities at dramatically lower rates *only if* [GSA] obtains those switching services from U S West, rather than from AT&T or other interexchange carriers" (1 C.A. App. A32-A33). The government filed a memorandum supporting AT&T's contention that U S West violated the decree by imposing higher access charges if GSA used AT&T switching services than if it used competing BOC services. Petitioner joined U S West in op-

posing the motion (1 C.A. App. A149-A243), arguing primarily that the MFJ does not prohibit discrimination against AT&T (1 C.A. App. A199-A202) and that the difference in charges is proper under the FCC access charge rules because GSA is an end user whereas AT&T is an interexchange carrier (1 C.A. App. A198-A199, A231-A232).

The district court granted AT&T's motion, ordering that U S West "(1) provide exchange access and other local exchange facilities for the Federal Telecommunications System (FTS) network and other private networks at the same rates, regardless of which carrier a customer selects to provide switching functions, and (2) publicly • • • announce the access and other local charges that will be the basis for any U S West responses to the General Services Administration's pending request for proposals" (Pet. App. 62a). In a short accompanying opinion, the court explained that "U S West's obligation under the decree not to discriminate in the pricing of exchange access and exchange service on the basis of a customer's choice of switching service is crystal clear," both from the language of the decree and from prior orders interpreting it (*id.* at 57a). The court rejected the argument that the MFJ permitted discrimination against AT&T (*id.* at 58a n.5), and it found no conflict between the MFJ as construed and federal or state regulatory requirements (*id.* at 58a-60a). U S West appealed.

b. After the district court's decision, petitioner filed a motion for clarification and a request for a stay with the district court, requesting a ruling on "whether or not the Court's Order • • • granting AT&T's motion for relief against U S West has application to [petitioner]" (1 C.A. App. A268). Petitioner indicated that, although it would impose usage-sensitive rates in its future bids to GSA, it generally construed its tariffs and FCC regulations "to permit off-net terminations on private networks at busi-

ness exchange rates * * * provided that special access charges are also levied and paid" (1 C.A. App. A274). The court denied the motion (Pet. App. 52a-54a), and petitioner appealed.

Simultaneously with the filing of its motion in the district court, petitioner filed with the FCC a petition for a declaratory ruling in which petitioner requested a determination that the FCC's regulations permitted petitioner to apply the same access charges for ETS services that it applied for CCSA services (3 C.A. App. A668). While the appeals from the district court orders were pending, the FCC released a declaratory ruling and a notice of proposed rulemaking. Pet. App. 37a-51a; *Amendment of Part 69 of the Commission's Rules Relating to Private Networks & Private Line Users of the Local Exchange*, 2 F.C.C. Rcd 7441 (1987). In response to petitioner's petition, the FCC held that "on the record before us * * * Centrex-ETS service described in the pleadings should be treated like CCSA service for purposes of the access charge rules" (Pet. App. 50a). It noted, however, that "we are today initiating a Rule Making [that] will specifically consider whether switched access charges should continue to apply to Centrex-ETS" (*id.* at 51a n.29). In its notice of proposed rulemaking, the Commission discussed the complicated competitive relationships among various categories of switching services and devices, noting that its disposition of petitioner's petition "resolved the immediate controversy" (para. 34), but only "tentatively" (para. 45). The Commission also requested comments on various alternative approaches to the problem. 2 F.C.C. Rcd at 7445-7451.

c. The appeals of petitioner and U S West were consolidated in the court of appeals. Citing the Commission's response to its petition, petitioner argued in its reply brief in the court of appeals that the district court's order en-

forcing the antitrust decree should be vacated because the case was moot. No other party in the court of appeals agreed with petitioner that the case was moot, and U S West (among others) vigorously disputed petitioner's mootness argument.

The court of appeals affirmed the district court's orders. The court of appeals agreed with the district court on the merits, holding that the language of the MFJ does not allow the BOCs to discriminate against AT&T (Pet. App. 10a-14a) and that U S West's rates constituted discrimination against a competitor (*id.* at 15a-18a). In addition, the court of appeals found it "clear that the trial court acted properly in denying [petitioner's] motion for clarification" (*id.* at 19a).

The court also rejected petitioner's mootness claim (Pet. App. 20a-24a). It reasoned that AT&T had a right to enforce the MFJ (*id.* at 20a). The court further ruled that the FCC's action granted no relief to AT&T, but, particularly in the context of the notice of proposed rulemaking, was merely a provisional ruling that petitioner could comply with the MFJ without violating any FCC rules while the agency considered the matter further (*id.* at 20a-23a). Moreover, the court of appeals observed that the FCC ruling did not resolve the issue regarding Dial 8 lines, which was also part of AT&T's motion (*id.* at 21a). Finally, the court noted, petitioner's contention seemed to be a primary jurisdiction argument "under the guise of a mootness claim," and the court pointed out that the primary jurisdiction argument in this case has repeatedly been rejected (*id.* at 23a). Judge Starr dissented on the ground that the case was moot (*id.* at 25a-36a).

2. The petition presents only the question of mootness, not a challenge to the merits of the order enforcing the antitrust decree. The court of appeals' ruling on the fact-bound mootness issue is correct and does not conflict

with the decision of any other court of appeals. Accordingly, the case does not warrant review.

a. A case is not moot if the parties retain a "legally cognizable interest in the outcome" (*Powell* v. *McCormack*, 395 U.S. 486, 496 (1969); see also *FDIC* v. *Mallen*, No. 87-82 (May 31, 1988), slip op. 6 n.7). The avowedly tentative response of the FCC to the petition filed by petitioner after petitioner lost in the district court does not deprive the parties to the MFJ of an interest in interpretation and enforcement of the MFJ.[2]

The FCC was concerned with determining which access charges should be applied, under its regulations, to particular switching arrangements. The issue before the district court was the interpretation of the MFJ, a decree entered in a suit brought under the Sherman Act (15 U.S.C. 1 *et seq.*).[3] The MFJ imposes obligations on the BOCs that are independent of the obligations imposed by the Communications Act of 1934 (47 U.S.C. (& Supp. III) 151 *et seq.*) and the regulations adopted under it; definition of the BOCs' obligations under one set of require-

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[2] If a controversy existed when a case was filed, the burden on the losing party to demonstrate mootness " 'is a heavy one.' " *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979) (quoting *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953)).

[3] Thus, central to the position of U S West and petitioner on the merits was an argument that has no relevance in an FCC proceeding: that the language and history of the MFJ compel an interpretation allowing a BOC to discriminate against AT&T. That issue has been raised, at least implicitly, with respect to other MFJ interpretation questions (see Pet. App. 12a-13a), and its definitive resolution will be of continuing significance. Because the MFJ was entered to protect the public interest in competition, there is a public interest in removing any doubts about the obligations of the BOCs. That public interest counsels against holding this case to be moot. See *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 674-675 (1944).

ments does not obviate the need to define their obligations under the other.

As the court of appeals recognized (Pet. App. 23a-24a), petitioner's mootness claim amounts to an attack on the authority of district courts to enforce antitrust decrees with respect to conduct that is also subject to regulatory jurisdiction.[4] The MFJ was affirmed by this Court and has been in effect for more than five years. It is too late to argue that it may not be enforced because conduct that violates it may also violate FCC regulations.[5]

b. Petitioner's contention that the FCC ruling obviated any need for the district court's order is wrong for at least three reasons, even assuming that the FCC's order finally resolves the issues with which it deals. First, the scope of the district court's order exceeds the scope of the FCC's ruling in certain significant respects.[6] The district

[4] The district court and the agency in this case reached consistent results with respect to the conduct in issue. This case, therefore, does not raise the question of reconciling conflicts between regulation and antitrust decrees.

[5] Contrary to petitioner's contention (Pet. 15-17), the Fifth Circuit has not adopted a rule broadly precluding district courts from enforcing existing antitrust decrees if an agency declares that the offending conduct also violates other prohibitions. In *Western Elec. Co.* v. *Milgo Electronic Corp.*, 568 F.2d 1203 (5th Cir.), cert. denied, 439 U.S. 895 (1978), on which petitioner relies, there was no underlying injunction already in effect. Nor did the agency designate its action as "tentative." And the agency's order encompassed the relief afforded by the district court, unlike the agency order in this case (see pp. 9-10, *infra*).

[6] In other respects, of course, the scope of the issues with which the agency deals is much broader than the scope of the issue presented by the MFJ's prohibition on discrimination, which focuses solely on conduct that disadvantages a competitor and thereby threatens to impair competition. The MFJ does not govern the level of rates, so long as there is no discrimination; nor does it govern disparities in the rates paid by parties not in competition with each other.

court's order applies to any type of discrimination U S West might use to gain an anticompetitive advantage for its switching services over those of its competitors, whereas the FCC's decision relates only to the access charges to be used in connection with Centrex-ETS and CCSA services. The district court's order also covers access to the local exchange for intrastate telecommunications that are outside the jurisdiction of the FCC (see 47 U.S.C. (& Supp. III) 152(b)(1)). And, as the court of appeals determined (Pet. App. 16a-18a, 21a), the district court order covers discrimination with respect to charges for Dial 8 lines.[7]

Second, the FCC's order is merely declaratory in nature; a violation could only be remedied through separate enforcement proceedings. The district court, on the other hand, entered an injunction requiring U S West to comply. U S West is subject to contempt sanctions if it disobeys that order. Thus, the FCC has not afforded AT&T the relief it sought and obtained in the district court.[8] Petitioner has cited no case in which a mere declaratory ruling

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[7] Petitioner contends that the court of appeals erred in finding that the district court decided the Dial 8 issue (Pet. 5 n.2, 14-15 n.8). The district court did not refer to the Dial 8 lines specifically in its opinion, but the order is broad and inclusive: U S West must provide all "exchange access and other local exchange facilities * * * at the same rates" and publicly announce all "access and other local charges" that will be the basis for its response to GSA's requests for proposals (Pet. App. 62a). Indeed, U S West's briefs in the court of appeals indicated its understanding that the order applied to Dial 8 lines as well as access charges. In any event, the correctness of the court of appeals' interpretation of the district court's order is not an important issue of law warranting review by this Court.

[8] The MFJ was entered in an antitrust suit in which the government charged, among other things, that the Bell System had discriminated against its competitors in affording access to the local exchange monopoly, despite the prohibitions of the Communications Act. The MFJ prohibited the discrimination involved here, in terms that the

by an administrative agency has been held to moot a case in which one party had obtained an injunction against the other.

Finally, the district court determined that U S West's rates violated an existing injunction, the MFJ. No sanctions have yet been imposed, but that possibility remains open. The Department of Justice is continuing to investigate U S West's provision of switching services to GSA, and it will seek judicial enforcement action if it concludes that sanctions or further remedial orders are appropriate. In these circumstances, the case plainly is not moot.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1988

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district court found "crystal clear" (Pet. App. 57a). In these circumstances, an FCC ruling that does no more than declare the law cannot alone satisfy petitioner's heavy burden of establishing that "there is no reasonable expectation that the wrong will be repeated." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

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No. 88-189

IN THE

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OCTOBER TERM, 1988

BELL ATLANTIC,

Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

Respondents.

AT&T'S OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION RESTATED

Whether a 1986 District Court order that interpreted a previously-entered antitrust injunction could be mooted on appeal by an intervening FCC decision when: (1) the question of sanctions for past violations of the antitrust injunction as interpreted is pending, (2) the FCC decision was a response to the District Court order, is more limited than the order, and cannot prevent repetition of the dispute between the parties in the future, and (3) no one claims that the underlying antitrust injunction is itself now moot?

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REASONS FOR DENYING THE WRIT

This case arises under the 1982 antitrust Decree that was entered to prevent the Bell Operating Companies ("RBOCs") from using their control over "bottleneck" local telephone monopolies to foreclose or impede competition in related competitive markets.[1] In its November, 1986 order, the District Court interpreted this injunction to bar a classic "tie-in" arrangement in which one RBOC (U S West) offered to provide its monopoly facilities at special low rates only if a customer also obtained competitive private network switching services from U S West, rather than from AT&T or one of U S West's other switching service competitors. The Court of Appeals affirmed this interpretation. *See* App. 10a-15a; *see also id.* 36a (Starr, J., dissenting on other grounds).

The sole question raised in the petition is whether the issue of Decree interpretation was somehow rendered moot on appeal by

[1] *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

a 1987 FCC decision that was obtained by Bell Atlantic *in response* to the District Court's 1986 order. *See* Petition ("Pet."), p. 6. There is no reason or basis to review this mootness question. The Court of Appeals' holding is a correct application of well-settled principles to a set of unique facts and does not conflict with the decision of any other court of appeals. Moreover, the mootness question possesses no conceivable national importance.

1. That there was a live controversy in the Court of Appeals is starkly demonstrated by the fact that the RBOC who is the subject of the November, 1986 order (U S West) vigorously opposed Bell Atlantic's mootness claims and that the other three RBOCs who participated in the appeal similarly urged the Court of Appeals to decide the Decree interpretation question on the merits.[2] They did so because there are at least three separate reasons why the subsequent 1987 FCC decision could not moot the issue of Decree interpretation presented by U S West's conduct.

First, as U S West argued below, the short answer to Bell Atlantic's mootness claim is that the District Court order did not merely establish a rule of conduct for the future. *See* U S West Reply Br., p. 12 (Jan. 19, 1988). It established that U S West had committed violations of the Decree in the past and will be subject to sanctions when the Justice Department completes its pending investigation.[3] As the very case that Bell Atlantic cites recog-

[2]Reply Br. of U S West, pp. 11-12 (Jan. 19, 1988) (arguing case is not moot); Opposition of Pacific Telesis Group to Motion for Extension of United States, pp. 3-4 (Dec. 11, 1987) (same); *see* Reply Br. of Ameritech, pp. 2-3 (Jan. 19, 1988) (urging Court of Appeals to decide merits); Br. of NYNEX, pp. 4-5 (Nov. 13, 1987) (same); *see also* Br. of United States (December 21, 1987) (same); Supplemental Br. of AT&T, pp. 3-8 (Feb. 11, 1988) (arguing case is not moot).

[3]App. 5a-6a & 15a-20a (holding that U S West had engaged in discriminatory pricing of exchange access facilities by offering GSA discounts of between $77,000 and $150,000 per month only if it used U S West switching services and that this price discrimination violated the Decree); *see also id.* 18a n.6 (recognizing that the only matter that the District Court did not conclusively decide was whether there had also been discriminatory pricing of Dial 8 lines in the past).

nizes, an FCC decision cannot moot antitrust issues that determine whether damages or other sanctions are awarded for past misconduct. *Western Electric Co.* v. *Milgo Electronics Corp.*, 568 F.2d 1203, 1208 (5th Cir. 1978) (antitrust claim for an "award of damages . . . is not moot[ed]" by FCC decision). *See Powell* v. *McCormack*, 395 U.S. 486, 495-500 (1969). This vividly demonstrates that there is no conflict among the courts of appeals.

Second, this is *not* a case in which "[a]ll the parties recognize that [the FCC order] prevents" recurrence of the challenged U S West conduct in the future. *Compare Western Electric Co.* v. *Milgo Electronics Corp.*, *supra*, 568 F.2d at 1207-08. To the contrary, AT&T and U S West each disputed the point below. *See* p. 2 n.2, *supra*. And Bell Atlantic did not even attempt to satisfy the "heavy" burden of establishing that the 1987 FCC decision makes it "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney of Smithfield* v. *Chesapeake Bay Foundation, Inc.*, 108 S.Ct. 376, 386 (Dec. 1, 1987) (emphasis in original), *quoting United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953), and *United States* v. *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968). This burden cannot be met.

Indeed, as the Court of Appeals found (App. 21a) and as Bell Atlantic admits (Pet., p. 10 n.6), the 1987 FCC order does not even address discrimination in the provision of Dial 8 lines, and could not prevent this price discrimination in the future. *See* App. 16a-18a.[4] Similarly, the 1987 FCC order is equally incapable of preventing recurrence of the anticompetitive conduct with respect to the "local exchange access" lines. *See* App. 10a-16a.

[4]Bell Atlantic is thus reduced (Pet., p. 10 n.6) to asking the Court to grant certiorari to consider Bell Atlantic's contention that the Dial 8 line issue somehow was not before the Court of Appeals at all. However, this was one of the two forms of price discrimination that was challenged by AT&T in the District Court, and U S West conceded that the District Court enjoined future discrimination in the provision of Dial 8 lines. *See* U S West Br., p. 40 (Nov. 6, 1987).

The overriding fact is that FCC regulations have always provided that U S West and other RBOCs must establish non-discriminatory charges for the monopoly telephone facilities that provide access to AT&T's CCSA service and to the "CCSA-equivalent" services of AT&T competitors. *See* App. 48a. Yet these regulations did not prevent U S West from misusing its local monopolies to foreclose competition in the past. What U S West did was to devise a new switching service (which U S West called "Centrex-ETN"), unilaterally decide that its Centrex-ETN would not be treated as a CCSA-equivalent service, and, on that basis, unilaterally exempt its switching customers from the exchange access charges that apply to customers of AT&T's CCSA services.

The 1987 FCC decision cannot prevent repetition of this conduct. It merely holds that U S West's Centrex-ETN service is equivalent to AT&T's CCSA and that the same access charges apply to customers of both services. Nothing in the FCC order could prevent U S West from hereafter, again, developing new private network switching services, concocting arguments that they are different from AT&T's CCSA, and unilaterally giving U S West's switching service customers access charge discounts.

Indeed, the risk of repetition is acute because U S West has a demonstrated propensity for price discrimination, even in the face of explicit statements that it is illegal. U S West engaged in the discrimination that led to this proceeding after it had made formal commitments to the Decree court that it would always charge the same access rates, regardless of whose switching services were selected. *See* Memorandum Order, pp. 6-7 (June 28, 1985) (quoting U S West's prior commitment). This demonstrates that U S West has continuing incentives to engage in price discrimination when it advances U S West's competitive interests and that only an order of an antitrust court can prevent future misconduct. This is especially so here where the Decree was entered because the District Court found that FCC regulation

could not prevent such anticompetitive conduct by the RBOCs. *See United States* v. *AT&T*, *supra*, 552 F. Supp. at 170.

Finally, there is no authority for Bell Atlantic's mootness claim. Bell Atlantic cannot, and does not, claim that mootness principles require that the pertinent provisions of the injunction (Section II(B) and Appendix B, Section B) be vacated. The underlying issue on the merits is thus the construction of an injunction that was entered in 1982 and that remains in effect today. *Western Electric Co.* v. *Milgo Electronics Corp.*, *supra*, did not involve such decree interpretation issues. And there is no case that even suggests, much less holds, that jurisdictional principles can prevent a court from issuing interpretations of a concededly valid and binding injunction when, as here, the United States, AT&T, U S West, and three other RBOCs urgently sought the interpretation to clarify their rights and obligations (*see* p. 2 n.2, *supra*), and when only one of the nine parties to the decree contended the interpretation is not needed.

2. In any event, the mootness question presented by this case has no conceivable national importance. Because Bell Atlantic has not cited a single case in which mootness issues have arisen in the context of a decree interpretation dispute, there is no reason to believe that such mootness questions will ever arise again, much less that they will arise with any frequency. Indeed, questions whether agency decisions moot antitrust or other cases seldom arise in any context.

And there is no substance to Bell Atlantic's claim that the District Court's interpretation of the Decree was a novel one and that review of the mootness issue is somehow warranted on this ground. *See* Pet., pp. 17-18. All three members of the Court of Appeals indicated that the terms, purposes, and history of the Decree required the District Court's order; the members of the panel disagreed only on which provisions of the Decree supported it. *Compare* App. 15a-20a (relying on Section II(B) and Appendix B, Section B), *with id.* 36a (Starr, J., dissenting) (the "better course" would be to rely on Appendix B alone).

Thus, the members of the panel all recognized that, contrary to Bell Atlantic's misstatements (Pet., p. 6), the District Court's order does not prevent the RBOCs from charging different rates to different classes of customers and does not call into question the regulatory classifications of customers that the Decree was not intended to disturb. Rather, all the District Court's order does is prevent the RBOCs from charging a single customer (or class of customers) lower rates for essential monopoly facilities if the customer obtains a related competitive service from the RBOC, rather than its competitor.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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No. 88-189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

BELL ATLANTIC,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY MEMORANDUM

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TABLE OF AUTHORITIES *

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* A current listing required by Supreme Court Rule 28.1 appears on page iii of Bell Atlantic's Petition for a Writ of Certiorari.

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PETITIONER'S REPLY MEMORANDUM

This case deserves the Court's attention because it raises a fundamental question as to the jurisdiction of federal courts over cases that have been rendered moot by administrative actions. Over a vigorous dissent by Judge Starr, a panel of the Court of Appeals for the District of Columbia Circuit exerted jurisdiction over this case, even though the dispute before the court had been fully resolved by an intervening order of the Federal Communications Commission ("FCC"). In doing so, the panel majority improperly departed from Supreme Court and other federal court precedent.

The decisions of the majority panel and the District Court below, if allowed to stand, would have a profound effect on the pricing of telecommunications services in

this country. The Court of Appeals itself was troubled by the potential impact of the District Court's ruling and sought to cure the defect by interpreting that decision to be limited to the precise facts presented to the District Court. (Pet. at 8, 17.) As Respondents the United States and American Telephone and Telegraph Company ("AT&T") themselves acknowledge, however, the District Court's decision has far broader ramifications. (Mem. of United States at 8-9; Opp. of AT&T at 4-5.) Its interpretation of the Modification of Final Judgment ("MFJ") could be, and is being, cited by Respondents as having established a new and sweeping precedent that could be used to constrain pricing decisions of the former Bell operating companies in a multitude of areas unrelated to the facts of this case. This interpretation vests in the District Court an extraordinary authority over the country's telephone rates, even though the Respondents, as parties to the MFJ, originally represented to this Court that the decree was not intended to interfere with the normal supervision of telephone rates exercised by the FCC and state regulators. (Pet. at 3, 17.)

In papers filed with this Court, the United States and AT&T now offer a variety of theories why the Court of Appeals was entitled to retain jurisdiction to review the District Court's order. None of these theories presents a cogent ground for departing from this Court's established mootness doctrines in the context of this case.

1. Both the United States and AT&T cloak their defense of the Court of Appeals' jurisdiction in the special character of the MFJ. The United States claims that to apply traditional mootness principles to this case "amounts to an attack on the authority of district courts to enforce antitrust decrees with respect to conduct that is also subject to regulatory jurisdiction." (Mem. of United States at 8.) AT&T suggests that Bell Atlantic cannot challenge the jurisdiction of the lower court in

this case without also bringing into question the substantive provisions of the MFJ. (Opp. of AT&T at 5.) These arguments misunderstand the nature of consent decrees and the limited power of the federal judiciary.

In terms of federal court jurisdiction, a consent decree is no different than a statute, a regulation, a contract, or any other body of law. The federal courts have authority to interpret such legal sources only in the context of live cases and controversies. Just as a federal court cannot render advisory opinions with respect to an act of Congress, an Article III tribunal cannot offer interpretations of a consent decree based on hypothetical or speculative facts.

Petitioner has not, and does not, contend that the District Court lacked jurisdiction over AT&T's emergency motion at the time it was filed. There was then an unresolved question whether U S West could impose different access charges depending on the type of switching equipment that the GSA selected. The District Court was thus empowered to resolve that question through interpretation of the MFJ.

Once the FCC issued an intervening final administrative order resolving the same issue, however, the controversy dissolved for Article III purposes. Because the case was still pending on appeal, the Court of Appeals should have vacated the District Court's order as moot.[1]

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[1] The same erroneous analysis taints the United States' effort to distinguish this case from the Fifth Circuit's decision in *Western Electric Co.* v. *Milgo Electronic Corp.*, 568 F.2d 1203, *reh'g denied per curiam*, 573 F.2d 255, *cert. denied*, 439 U.S. 895 (1978). The United States claims that *Milgo* is distinguishable because that case involved a claimed violation of the antitrust laws while this case concerns an alleged violation of an antitrust consent decree. (Mem. of United States at 8 n.5.) Such a distinction makes absolutely no difference, and inexplicably elevates consent decrees above other sources of law.

Likewise ill considered is Respondents' suggestion that the Court of Appeals retained jurisdiction to interpret the MFJ because only one of nine parties argued that the case was moot. (Opp. of AT&T at 5; Mem. of United States at 5-6.) It is elemental that the consent of litigants cannot vest a federal court with jurisdiction that is otherwise lacking. Indeed, this Court regularly dismisses cases as moot even when the parties involved unanimously agree that their lawsuits remain justiciable.[2] Respondents offer no logical reason why this rule should not also apply when federal courts are called upon to interpret consent decrees such as the MFJ.

2. The United States is also wrong to suggest that the declaratory nature of the FCC's order diminishes its impact on the justiciability of this case. (Mem. of United States at 9.) This Court has long recognized that "declaratory relief alone has virtually the same practical impact as a formal injunction."[3] Consistent with this view, the lower federal courts on numerous occasions have dismissed cases as moot because of intervening administrative actions that were declaratory in nature.[4] To our knowledge, neither this Court nor any other federal court (aside from the Court of Appeals majority panel in this case) has suggested that administrative actions should not be allowed to moot judicial proceedings.

Indeed, this Court has decided that a judicial proceeding can be mooted by far less. In *Iron Arrow Honor Society* v. *Heckler*,[5] the Court ruled that a new univer-

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[2] *See, e.g., County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979); *id.* at 637 (Powell, J., dissenting); *DeFunis* v. *Odegaard*, 416 U.S. 312, 315 (1974) (*per curiam*).

[3] *Samuels* v. *Mackell*, 401 U.S. 66, 72 (1971).

[4] *See* cases cited in Pet. at 12-13, 15-17.

[5] 464 U.S. 67 (1983) (*per curiam*).

sity policy prohibiting a campus honor society from conducting initiation ceremonies on university property was sufficient to moot a lawsuit brought by the society against the federal government. If a university's unilateral declaration on such an issue could moot a controversy for Article III purposes, there is no conceivable reason why a declaratory ruling by an agency of the federal government should not have precisely the same effect.

The United States further mischaracterizes the FCC's action as "tentative" with respect to Bell Atlantic and other former Bell operating companies. Petitioner invites the Court to review the full text of the FCC's decision in this matter. (Pet. App. at 37a-51a.) Nowhere in that decision does the FCC suggest that its action would have anything less than binding effect on Bell Atlantic or similarly situated entities. Indeed, the word "tentative" does not even appear in that order.[6] Clearly, the FCC's ruling has the force of law and must be accorded full deference in determining whether the federal courts retain jurisdiction over this litigation.

3. In a further effort to breathe justiciability back into this case, the United States and AT&T argue that the case is not moot because AT&T might use the District Court's interpretation of the MFJ to prevent the former Bell operating companies from engaging in future "discriminatory" practices in situations other than those considered by the District Court. (Mem. of United States at 8-9; Opp. of AT&T at 4-5.)

These assertions undercut the claims of the United States and AT&T that this case is "fact-bound" and unimportant. In any event, though, these assertions as to the broad impact of the District Court's ruling have no bearing on the issue presented in Bell Atlantic's petition.

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[6] Bell Atlantic has previously explained why the possibility of subsequent FCC rulemaking should not affect the Court's analysis of the justiciability of this case. (Pet. at 14.)

The mere fact that the lower courts' decisions would have precedential value to AT&T does not mean that this case remains live for Article III purposes. Indeed, if this were not the case, few lawsuits would ever become moot because the prevailing party would always be able to speculate as to some hypothetical new controversy for which a favorable ruling would be helpful.

The proper test of justiciability—and the one Judge Starr urged on the majority panel in the Court of Appeals—turns on whether the actual controversy which brought the parties to court in the first place remains live. Here, the sole issue properly presented to the District Court for interpretation under the MFJ was whether or not U S West could discriminate in access charges for GSA switching systems.[7] Once the FCC definitively resolved this matter, the case was rendered moot regardless of whether this consequence may deprive AT&T of a useful precedent.

4. Respondents also argue that the justiciability of this case is preserved because the Justice Department is still considering whether to bring an enforcement action against U S West for violating the MFJ with respect to its provision of switching services to the GSA. The Department has been aware of this matter for more than two years without taking any enforcement action. Even if some enforcement action were imminent, however, this point would be irrelevant.

In previous mootness cases, this Court has not considered collateral enforcement actions as sufficient grounds

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[7] As explained in Judge Starr's dissent (Pet. App. at 29a-30a), and as Respondents do not contest, the District Court never made the factual findings necessary to rule on AT&T's original motion with respect to Dial 8 lines. As Judge Starr noted, under these circumstances, the appropriate disposition would have been to remand the case for further proceedings, if necessary, before the District Court. *See Duke Power Co.* v. *Greenwood County*, 299 U.S. 259 (1936) (*per curiam*).

for retaining jurisdiction over otherwise moot cases. For example, in *Diffenderfer* v. *Central Baptist Church, Inc.*, the Court had before it a Florida tax statute that had been declared unconstitutional under the First Amendment.[8] Intervening Florida legislation had repealed the statute in question, but there remained some uncertainty whether the state might later seek back taxes from the taxpayer under the repealed law.[9] The Court nevertheless ruled the case moot on the grounds that the controversy that precipitated the case—the constitutionality of the original Florida statute—was no longer live.

The pending Justice Department investigation of U S West should be treated in the same manner in this case. In the event that the Department eventually chooses to proceed against U S West, there will be ample opportunity for the appropriate tribunal to determine whether U S West actually violated the MFJ—an issue the District Court here did not reach since its relief was solely prospective—and, if so, what form of sanctions, if any, would be appropriate. In the meantime, there is no judicially cognizable controversy over the application of the MFJ to access charges for GSA switching services.

5. Finally, Respondents argue that, even if the FCC's action did dispose of the controversy before the Court of Appeals, the case could not be moot unless Bell Atlantic meets the "heavy burden" of showing that the alleged wrongful behavior of U S West, which led to the proceedings before the District Court, could not recur. (Opp. of AT&T at 3; Mem. of United States at 7 n.2.) Here again, Respondents are wrong on the law. The cases cited by Respondents all involved defendants who voluntarily complied with adverse decisions and then claimed that those decisions were moot. In those situations, courts are understandably concerned that the defendant's action is

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[8] 404 U.S. 412 (1972) (*per curiam*).

[9] *Id.* at 415-17 (Douglas, J., dissenting).

simply a tactic to force the vacating of an adverse judgment, and so they require compelling evidence that the defendant would not repeat the conduct that led to the initiation of proceedings in the first place.

Here, however, it is the action, not of a defendant, but of an independent third party—a government agency—that has mooted the appeal. As this Court has held in *Iron Arrow*, when the action of a nondefendant moots an appeal, there is no need for any heavy burden to be carried by a party claiming mootness because this is not a situation where voluntary compliance could be a tactic to force the vacating of an adverse judgment. Indeed, when the effect of a lawsuit is overtaken by intervening actions of an independent third party, federal courts are constitutionally obliged to dismiss the case as moot whether or not any party raises the issue of justiciability.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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